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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 302

STATE CORPORATION COMMISSION OF KANSAS, HARRY G. WILES, CHAIRMAN, MARION BEATTY, AND RICHARD G. BYRD, AS MEMBERS OF SAID COMMISSION, AND THEIR RESPECTIVE SUCCESSORS IN OFFICE,

Petitioners.

VS.

CITIES SERVICE GAS COMPANY, a Corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS.

J. ROBERT WILSON, General Counsel,
State Corporation Commission of Kansas,
State Office Building,
Topeka, Kansas,

WAYNE COULSON, Counsel,
DALE M. STUCKY, Counsel,*

*Attorney upon whom service should be made.

901 First National Bank Building,
Wichita, Kansas,

Attorneys for Petitioners.

August, 1959.

E. L. MENDENHALL, INC., 1108 Oak Street, Kansas City 6, Mo., HArrison 1-3030

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IN THE

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OCTOBER TERM, 1959.

No.

STATE CORPORATION COMMISSION OF KANSAS, HARRY G. WILES, CHAIRMAN, MARION BEATTY AND RICHARD C. BYRD, AS MEMBERS OF SAID COMMISSION, AND THEIR RESPECTIVE SUCCESSORS IN OFFICE,
Petitioners,

VS.

CITIES SERVICE GAS COMPANY, a Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS.

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of Kansas entered in the above-entitled case on April 11, 1959.

OPINIONS BELOW.

The judgment of the District Court of Finney County, Kansas (R. 19-21);* was entered without opinion. The opinion of the Supreme Court of Kansas (R. 159-166) is reported in 184 Kan. 540 (Advance Sheet No. 3, April, 1959) and is reproduced together with the dissenting opinion, in Appendix A, *infra*, pp. A1 to A17.

JURISDICTION.

The judgment of the Supreme Court of Kansas was entered on April 11, 1959 (R. 160). A motion for rehearing (R. 181-198) was filed by petitioners on May 15, 1959, within time as prescribed by order of the Supreme Court of Kansas (R. 180). The petition for rehearing was denied on May 20, 1959 (R. 199). The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1257 (3), 62 Stat. 929, since the validity of a state statute (administrative order having the force of law) is drawn in question on grounds of repugnancy to a law of the United States.

QUESTIONS PRESENTED.

1. Did mere enactment of the Natural Gas Act in 1938 so preempt the field as to preclude State minimum wellhead price regulation for conservation purposes prior to first exercise of Federal regulatory authority on July 16, 1954?

2. Is this Court's *per curiam* opinion and mandate in *Cities Service Gas Co. v. State Corp. Comm. of Kansas*, 355 U.S. 391, rehearing denied 355 U.S. 967, *res judicata* of question No. 1?

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*Page references are to the record as printed.

STATUTES INVOLVED.

The state statute involved is the order of the State Corporation Commission of Kansas entered on December 2, 1953, effective on and after January 1, 1954, reproduced in Appendix B, *infra*, pp. A18 to A25. The federal statute involved is the Natural Gas Act, 15 U.S.C. 717-719; 52 Stat. 821-833, (particularly Section 4 (c), 15 U.S.C. 717c (c), 52 Stat. 822, which is reproduced in Appendix C, *infra*, p. A35. The federal regulation involved is Order 174 of the Federal Power Commission, 19 Fed. Reg. 4534, which is reproduced in Appendix D, *infra*, pp. A36 to A52.

STATEMENT.

On March 12, 1958, this Court issued its mandate (R. 8-10) in *Cities Service Gas Co. v. State Corp. Comm. of Kansas*, 355 U.S. 391, rehearing denied 355 U.S. 967. That case was an appeal by respondent, Cities Service Gas Company, from a judgment of the Supreme Court of Kansas affirming the judgment of the District Court of Finney County, Kansas, which had upheld the validity of the conservation order of the State Corporation Commission of Kansas fixing as a condition of production, a minimum price of eleven cents per thousand cubic feet at the wellhead for gas to be taken from the Hugoton Gas Field in Kansas on or after January 1, 1954 (R. 8).

Under the terms of the mandate, the judgment of the Supreme Court of Kansas was reversed and the cause was remanded to the Supreme Court of Kansas "in order that such execution and proceedings may be had in said cause, in conformity with the judgment and decree of this court above stated, as, according to right and justice, and the

Constitution and laws of the United States, ought to be had therein, the said appeal notwithstanding." (R. 9).

Following receipt of this Court's mandate by the Supreme Court of Kansas, the state commission filed with the state supreme court an application for an order of mandate, conforming to the opinion and mandate of this Court, asking for the reversal of the judgment of the district court and for directions to the district court requiring it, in addition, to vacate and set aside the state commission order from and after July 16, 1954 (R. 2-5).

This was the first instance at which the federal question sought to be reviewed herein was raised.

The position of the state commission in such motion was that the mere enactment of the Natural Gas Act twenty years before, in 1938, did not in and of itself supersede state regulation in the field and that, the Act not being self-executing, state regulation contained in full force and effect until July 16, 1954, which was the date of the first regulation by the Federal Power Commission of independent producers thereunder (R. 2-5). The State Corporation Commission had therefore made no contention that the order was valid at least until July 16, 1954.[1]

On March 21, 1958, respondent Cities Service Gas Company filed a corresponding motion in the state supreme court seeking an order of mandate to the district court, conforming to this Court's mandate, directing the district court to set aside and hold for naught the Commission's order "as of its effective date and time, *i. e.*, 12:01 a. m., on January 1, 1954 (R. 6-7).

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[1] The brief of respondent filed in the Supreme Court of Kansas after remand by this court admitted (p. 4):

> "* * * at no time, until now, in brief, argument, or otherwise, has the Appellee [State Corporation Commission] made any contention that the Order was valid, at least until July 16, 1954. Here in its motion, and for the first time, the appellee raises the issue." ("Memorandum of Appellant on Motions As to Form of Mandate," filed in No. 40,402 in the Supreme Court of Kansas, on April 10, 1958).

As we shall outline below, at all times prior thereto, respondent had itself relied upon the *initial* validity of the state order, and this was the first instance at which Cities Service claimed the order to be void *ab initio* by virtue of conflict between Federal and State jurisdiction.

Issues thus being first joined as to when the Kansas order became invalid, the Supreme Court of Kansas, after hearing and briefs, in effect, although not expressly, overruled the motions of both parties and, instead of granting either of the requests thereof, sent to the district court a mandate directing that the previous judgment of the district court be vacated and set aside and directing "further proceedings not inconsistent with the mandate of the Supreme Court of the United States and its *per curiam* opinion." (R. 7-10).

Further proceedings were had in the district court in which both parties filed motions to the same effect as those which they had previously filed in the Supreme Court of Kansas, thus again putting in issue, this time in the trial court, the question as to whether the Commission order should be set aside *ab initio* or should be set aside from and after July 16, 1954 (R. 10-18, 18-19).

The district court, without objection from either party, vacated and set aside its previous judgment upholding the validity of the commission order. (Such previous judgment had been entered on May 14, 1956, two years after the first exercise on July 16, 1954, by the Federal Power Commission of jurisdiction over sales by independent producers. R. 20). But the district court also found that the state commission was "without jurisdiction" to enter the order dated December 2, 1953, and set it aside (R. 19-21).

The state commission appealed to the Supreme Court of Kansas (R. 21-22) specifying as error the district court's failure to limit its new judgment, insofar as it set aside the commission order, to a judgment setting the commission order aside only from and after July 16, 1954 (R. 23).

The Supreme Court of Kansas, with one justice dissenting (R. 167-175, Appendix A, pp. A8 to A17; 184 Kan. 545-551), affirmed the lower court's judgment in a written opinion filed and entered April 11, 1959, which is the judgment sought to be reviewed herein (R. 159-166, Appendix A, pp. A1 to A8; 184 Kan. 540 to 545).

In its opinion the Supreme Court of Kansas, in effect, changed the position it had taken when it remanded the case to the district court for determination, in further proceedings, of the question as to the date when the order became invalid. Instead of deciding the question on its merits, it examined this Court's *per curiam* opinion and mandate in the previous appeal and held that they were *res judicata* as to such question and precluded consideration by the Kansas court of the question raised by the appeal. It stated * * * "we understand the Supreme Court of the United States to hold that on January 1, 1954, the State of Kansas had no jurisdiction to regulate the price of natural gas as it came out of the well *since that price would affect interstate commerce* and the jurisdiction of the Federal Power Commission." (R. 165; Appendix A, p. A7, 184 Kan. 544, emphasis added). In treating this court's previous decision and mandate as *res judicata*, it stated "Any question of the meaning of the order of that court should have been raised with that court by the parties to that appeal." (R 166; Appendix A, p. A8, 184 Kan. 544).

Under Kansas law, the syllabus written by the court sets out the points of law decided and determined in the case (G.S.Kan., 1935, 60-3329). The syllabus by the court is as follows:

> "GAS.—Fixing Minimum Wellhead Price—Invasion of Federal Jurisdiction—Mandate of Supreme Court Construed. In an appeal from the order of the district court construing the mandate of the Supreme Court of the United States, which mandate reversed the decision heretofore entered by this court in this case, it is now held that the reversal of said decision *must be understood to hold* that the order of the State Corporation Commission dated January 1, 1954, and fixing a minimum price for natural gas at the wellhead invaded the jurisdiction of the Federal Power Commission and was not within the jursdiction of the State Corporation Commission to enter *even though the Federal Power Commission had not exercised jurisdiction in the matter.*" (R. 159-160; Appendix A, p. A1; 184 Kan. 541, emphasis added).[2]

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[2] A reference in the opinion of the court (R. 165; Appendix A, p. A7; 184 Kan. 544) to the case of *Natural Gas Pipeline Co. of America* v. *Harrington*, 5 Cir., 246 F.2d 915 (discussed later in this petition), and the court's discussion in connection therewith indicates that an alternate ground for decision may have been on the merits of the question raised. But from the language of the syllabus and the opinion as a whole, it is obvious that the decision is based almost entirely on the doctrine that the mandate and *per curiam* decision of this Court in the previous appeal was *res judicata*, precluding determination of the question on appeal before the Kansas court. Mr. Justice Fatzer, in his dissent, regarded the court's decision as being based solely on *res judicata*. (R. 167-175, Appendix A, pp. A8 to A17, 184 Kan. 545-551).

An important federal question is present in either event and this petition for certiorari is believed to be equally meritorious upon either theory of the basis of the Kansas court's decision.

REASONS FOR GRANTING THE WRIT.

A. Question Presented Is One upon Which Authoritative Decision Is Needed for Guidance of Courts and Federal Power Commission in Dozens of Pending Cases.

The question involved in this case has become the subject of extended litigation now pending undetermined in both state and federal courts. It is also the subject of proceedings now pending before the Federal Power Commission.

As we have noted, the question as to when the Kansas order became inoperative was first raised by both parties, and in the case at bar, immediately after receipt in Kansas of this court's mandate.

The following month, the Federal Power Commission opened, on April 28, 1958, its Notice of Proposed Rule Making, which is reproduced in Appendix E, *infra*, pp. A53-A56, and which is partially copied in the margin.[3] By means

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[3] "Among those questions which the Commission is considering in this connection which appear to be raised by the decisions of the Supreme Court referred to, are:

1. whether any rate filing predicated solely upon a State minimum price order which has been declared invalid by the United States Supreme Court—

    a. must now be regarded as having been invalid from the date of filing; or

    b. must now be regarded as having become invalid upon the issuance on January 20, 1958, of the decision of the Supreme Court in *Cities Service Gas Co.* v. *State Corporation Commission of Kansas*, 355 U.S. 391, or on March 12, 1958, when the mandate of the Supreme Court was issued in that case; or

    c. must now be regarded as having become invalid on the happening of some other event; or

    d. must be regarded as still effective;

of this notice, the Federal Power Commission invited comments and suggestions as to when, if ever, in view of this court's decision in the previous appeal,[4] independent producer filings under state minimum price orders must be regarded as invalid. Briefs were filed by interested parties, including the Kansas commission, and oral argument was had thereon. At the date of this writing, no action has been taken by the Federal Power Commission thereon. The Kansas Commission adopted in such proceedings the same view that it takes here.

The Kansas Commission is aware of at least 45 cases pending in state and federal courts of Nebraska, Delaware, Iowa, Oklahoma and Minnesota filed after this Court's mandate involving the identical question presented by this petition for certiorari.[5]

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i. by reason of failure of the purchaser thereunder to protect the filing; or

ii. by reason of an agreement, expressed or implied, to pay the filed rate;

iii. by reason of legal estoppel against a protest by a purchaser thereunder; or

iv. for any other reason."

[4] The Federal Power Commission action also was taken in view of this Court's decision in *Michigan Wisconsin Pipe Line Company* v. *Corporation Commission of Oklahoma*, 355 U. S. 425, involving a similar Oklahoma wellhead order. See second paragraph of the notice, Appendix E, p. A53.

[5] DELAWARE. (Suits in Superior Court, New Castle County):

Northern Natural Gas Co. v. *Champlin Oil & Refining Co.*;
Northern Natural Gas Co. v. *Hugoton Plains Gas & Oil Co.*;
Northern Natural Gas Co. v. *Gulf Oil Co.*;
Northern Natural Gas Co. v. *Warren Petroleum Co.*;
Northern Natural Gas Co. v. *White Eagle Oil Co.*;
Northern Natural Gas Co. v. *The Texas Co.*;
Northern Natural Gas Co. v. *Republic Natural Gas Co.*;
Cities Service Gas Co. v. *Western Natural Gas Co.*;

These cases all involve interstate pipeline companies, on the one side, and Kansas Hugoton independent producers, on the other side. It is generally the position of the independent producers that increased payments made by the interstate pipeline companies pursuant to the Kansas 11-cent order prior to July 16, 1954, were made under a

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Cities Service Gas Co. v. *Columbian Fuel Co.*,
Cities Service Gas Co. v. *The Texas Co.*;
Cities Service Gas Co. v. *Pan American Petroleum Co.*;

IOWA:

Northern Natural Gas Co. v. *Cities Service Oil Co.*, District Court, Pottawatomie Co., Iowa;

KANSAS (Suits in United States District Court):

Northern Natural Gas Co. v. *R. D. Burris* (Topeka);
Northern Natural Gas Co. v. *Trees Oil Co. and M. L. Benedum* (Topeka);
Northern Natural Gas Co. v. *Walter F. Kuhn* (Topeka);
Northern Natural Gas Co. v. *Courtney B. Davis and Marcellete G. Davis* (Topeka);
Northern Natural Gas Co. v. *Girard J. Neuner* (Topeka);
Northern Natural Gas Co. v. *Howard Kuhn* (Topeka);
Northern Natural Gas Co. v. *H. M. Gillespie* (Topeka);
Northern Natural Gas Co. v. *John R. LeBosquet* (Topeka);
Northern Natural Gas Co. v. *H. M. Gillespie and John R. LeBosquet* (Topeka);
Northern Natural Gas Co. v. *Alf M. Landon* (Topeka);
Northern Natural Gas Co. v. *Margaret Landon Mills* (Topeka);
Cities Service Gas Co. v. *Magnolia Petroleum Co.* (Wichita);

(Suits in State District Courts):

The Stevens County Oil & Gas Co. et al. v. *Panhandle Eastern Pipe Line Co.* (Stevens County);
Kansas-Nebraska Natural Gas Co. v. *H. M. Gillespie et al.* (Sedgwick County);
Kansas-Nebraska Natural Gas Co. v. *D. R. Lauck et al.* (Sedgwick County);
Kansas-Nebraska Natural Gas Co. v. *Ben F. Brack* (Sedgwick County);
Kansas-Nebraska Natural Gas Co. v. *William S. Milner et al.* (Sedgwick County);

then-valid state regulation and may not now be recovered by the pipeline companies. It is the position of the pipeline companies that this court's decision in the previous appeal in effect created, retroactively, a gap between the

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Kansas-Nebraska Natural Gas Co. v. *D. R. Lauck Oil Co. et al.* (Sedgwick County);

Fred Shore & Hazel Shore v. *Western Natural Gas Co. and Cities Service Gas Co.* (Seward County);

G. L. Hayward and Inez Hayward v. *Island Gas, Inc., Walter Kuhn and Panhandle Eastern Pipe Line Co.* (Morton County);

MINNESOTA (Suit in United States District Court):

Northern Natural Gas Co. v. *John B. Hawley, Jr.*, United States District Court, Fourth Division;

NEBRASKA (Suits in State Court):

Northern Natural Gas Co. v. *Pan American Petroleum Corp.* (Lancaster County);

Kansas-Nebraska Natural Gas Co. v. *White Eagle Oil Co.* (Lancaster County);

(Suits in United States District Court):

Northern Natural Gas Co. v. *Magnolia Petroleum Corp.* (Lincoln);

Northern Natural Gas Co. v. *Saturn Oil & Gas Corp.* (Lincoln);

Northern Natural Gas Co. v. *United Producing Co.* (Lincoln);

Kansas-Nebraska Natural Gas Co. v. *Cities Service Oil Co.* (Civil No. 0674);

Kansas-Nebraska Natural Gas Co. v. *Pan American Petroleum Corp.* (Civil No. 0675);

OKLAHOMA (United States District Court):

Northern Natural Gas Co. v. *William Broadhurst* (Tulsa);

Northern Natural Gas Co. v. *Anne Parker* (Western District);

Cities Service Gas Co. v. *J. M. Huber Corp.* (Western District);

Cities Service Gas Co. v. *United Producing Co.* (Western District);

Cities Service Gas Co. v. *Cabot Carbon Co.* (Western District);

exercise of valid state and federal regulatory power and that such payments should now be refunded to them.[6]

The list of cases set out in Note 5 does not purport to be complete. Since there are approximately 500 Kansas Hugoton independent producers, more litigation may be

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[6] In Docket R-168, the F.P.C. noted the absence of reparation power under the Natural Gas Act and invited comment as to whether the ultimate consumer would benefit from any such refunds (Appendix E, *infra*, p. A53). The Kansas Commission presented the following analysis in response thereto:

> "The Kansas Commission is also concerned over claims for refund made by pipeline purchasers for the difference between the payments made under 11-cent filings and lower amounts claimed due under the old contracts. We frankly do not know the exact amount of these claims. We estimate the amount at $60,000,000.00. The mere threat of having to refund such a huge sum has resulted and will continue to result in sharply curtailed marginal drilling, re-working of wells, and development of deep gas reserves * * *.
>
> "* * * the Kansas Commission suggests that the detriment to consumers from reduced Hugoton field prices, either past or future, will greatly outweigh the relatively small consumer refunds or rate reductions which would result if producers and royalty owners were actually compelled to repay the entire estimated $60,000,000.00.
>
> "Our analysis of pipeline purchases in the Kansas Hugoton field from January 1, 1954, effective date of the Kansas order, through 1957 reveals that the six interstate pipeline companies purchased approximately 1,247,424 MMCF of gas. Of those purchases, only purchases by Cities Service Gas after September 23, 1954, and Northern Natural Gas Company after June 27, 1956, are subject to Federal Power Commission orders of refund to distributing companies of amounts which might be recovered from producers. Analysis of Federal Power Commission records indicates that approximately 237,912 Mmcf. of jurisdictional sales are covered by those orders.
>
> "The Federal Power Commission thus retains jurisdiction to compel refunds to distributing companies of twenty per cent or approximately $12,000,000.00 of the total of $60,000,000.00 difference between contract prices and the Kansas minimum order during the period from its effective date to the date it was held invalid. The other $48,000,000.00 would be a windfall to the pipeline companies.
>
> "Much of the gas distributed in Kansas is interstate gas or commingled interstate and intrastate gas, sales of which

expected. Pipeline companies are making additional claims, with further litigation threatened.[7]

We know of only one instance in which a court has directly decided whether the mere passage of the Natural Gas Act in 1938 directing regulation by the Federal Power Commission was such exercise of authority by the National government as to supersede State minimum price regulation *prior* to the time regulatory action was taken by the F.P.C. That case is *Kansas-Nebraska Natural Gas Co.* v. *State Corporation Commission*, 169 Kan. 722, 222 P.2d 704. The entire opinion denying rehearing in that case is devoted to that specific subject. 170 Kan. 341, 225 P.2d 1054.

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by Cities Service Gas Company to local distributing companies are under Federal Power Commission regulation. Speaking for ourselves, we believe we have no jurisdiction to compel refunds to consumers by distributing companies and any refunds by Cities Service Gas to Kansas distributors will simply be a windfall to the distributing companies without any benefit whatever to the consumer. We think it likely that other state regulatory bodies may be similarly circumstanced.

"The concurring opinion of Justices Jackson and Burton in *Federal Power Commission* v. *Interstate Natural Gas Co.*, 336 U.S. 577, points out that in a case involving $1,484,000.00 (181 F.2d 834) collected under bond refunds to thousands of customers of particular distributors would average only fifteen cents each, an amount less than the cost of making the distribution * * *."

If it be assumed that in some fashion the consumer could be assured of receiving the entire $12,000,000.00 of refunds over which the Federal Power Commission still retains some control * * * the consumer would be paying too high a price in loss of gas reserves and increased future prices for the small amount of money he presently received (Comments by State Corporation Commission of Kansas," filed in F.P.C. Docket No. R-168, pp. 23-26).

[7] The same issue is raised in *Western Natural Gas Company* v. *Cities Service Gas Co.*, pending before the Federal Power Commission, Docket No. G-14,958.

No appeal was taken to this court and the question has consequently not been determined by this court.[8]

The court below completely overlooked this direct holding on the subject, but referred to *Natural Gas Pipeline Co. of America* v. *Herrington*, 5 Cir., 246 F.2d 915, leave to file second petition for rehearing denied 253 F.2d 231, certiorari denied 356 U.S. 957, as deciding the question. The question was never raised in that case in the district court (see 139 F. Supp. 452) nor was it raised on appeal (see 246 F.2d 915), nor on motion for rehearing. It was first raised on motion for leave to file a second petition for rehearing (see 253 F.2d 231). The Kansas court (R. 165-166, Appendix A, *infra*, p. A7; 184 Kan. at 544) erroneously described the final order of the Court of Appeals as one *denying* a second petition for rehearing, whereas the order was, in fact, one properly *denying leave* to file the same. That action of the Court of Appeals was not and could not have been a determination of the question at bar.[9]

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[8] *Natural Gas Pipeline Co.* v. *Panoma Corp.*, 349 U.S. 44, decided April 11, 1955, could not have been such a determination because F.P.C. regulation had on that date been in effect for seven months—since June 16, 1954, and such regulation was relied upon by the appellant there, as shown by its brief on file with this court:

> "Pursuant to the decision last cited, the Federal Power Commission has adopted extensive regulations applicable to independent producers, relating to the filing of applications for certificates of convenience and necessity, the filing of gas sale contracts and many other details.[7] And during January of this year, the Commission held comprehensive hearings relating to the principles by which rates should be fixed for sales of gas by independent producers to interstate pipeline companies.[8]
>
> * * *
>
> "[7] See 19 Fed. Reg. 8807.
>
> "[8] Federal Power Commission Docket No. R-142, 'Consideration of Principles and Methods to be Applied in the Fixing of Rates to be Charged by Independent Producers for Natural Gas Sold in Interstate Commerce for Resale'" (Joint Brief of Appellant, *Natural Gas Pipeline Co. of Am.* v. *Panoma Corporation*, No. 191, *Natural Gas Pipeline Co. of Am.* v. *Corp. Com. of Oklahoma*, No. 321, p. 12).

The question there (see dissent of Mr. Justice Douglas) was *whether* the F.P.C. had entered the field to a sufficient extent that its entrance superseded state conservation regulation, and not *when* the federal government entered the field.

In addition, this case, as well as *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (which did not involve a state order), was concerned with natural gas moving in interstate commerce *after both production and gathering had been completed*, thus probably falling in the class of *Missouri* v. *Kansas Gas Co.*, 265 U.S. 298 and *Pub. Util. Comm.* v. *Attleboro Co.*, 273 U.S. 83, a category over which the state never had conservation jurisdiction. This is pointed out in the dissent of Mr. Justice Fatzer in the case at bar (R. 170, Appendix A, *infra*, p. A9, 184 Kan. at 547).

The question presented by this petition was sought to be raised belatedly in two other cases of which we have knowledge, both involving review of orders of the Federal Power Commission. *Natural Gas Pipeline Co. v. Federal Power Com'n.*, 3 Cir., 253 F.2d 3, cert. den. *Dorchester Corp. v. Natural Gas Pipeline Co.*, 357 U.S. 927, and *Cities Service Gas Company v. Federal Power Commission*, 10 Cir., 255 F.2d 860, cert den. *Magnolia Petroleum Co. v. Cities Service Gas Co.*, 358 U.S. 837. The question was sought to be raised for the first time in both cases on motion for rehearing, which was denied in each instance without written opinion.

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[9] The Court of Appeals, 253 F.2d 231, gratuitously stated that Mr. Justice Douglas' dissent in *Natural Gas Pipeline Co.* v. *Panoma Corp.*, 349 U.S. 44, shows that this Court considered the question. We have carefully examined the briefs in *Panoma* and nowhere is the question presented here even mentioned. If Mr. Justice Douglas had meant that the conflict about which he was talking was the mere enactment of the Act in 1938 or of first exercise of jurisdiction over independent producers on July 16, 1954, he would not have said "until the Federal price regulation permitted by *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, *is* imposed." 349 U.S. 44. He would have said *was* imposed. Obviously Mr. Justice Douglas was referring to actual conflicting rate making by the Federal Power Commission which had not by then been imposed.

We feel that this dissent probably means one of two things—(1) the majority disagreed with the view of Mr. Justice Douglas that conflict could only arise after the F.P.C. started actual rate making and not while it was merely requiring *ex parte* filings and considering how to go about rate making or (2) that the subject of when conflict began should not be considered because it was neither briefed nor argued. Of the two possibilities, the latter seems more probable.

Here, for the first time, this troublesome question is properly before this court, ripe for decision. Determination of the question in this case as to when the Kansas order became inoperative will give authoritative guidance to the many courts in the country which now have the problem before them. It will also give greatly needed guidance to the Federal Power Commission with respect to the filings of hundreds of Kansas independent producers under the Order No. 174 series.

Currently sixteen or more[10] states regulate various aspects of the production and/or gathering of natural gas and the facilities used therein. As is indicated by the continuous litigation over which activities of independent producers are exempt from Federal Power Commission regulation, there exists substantial doubt and disagreement as to the effect of the production and gathering exemption contained in Section 1(b) of the Natural Gas Act (15 U.S.C., Section 717(b)), 52 Stat. 821 and consequently substantial doubt as to the limits of the area of permissible state regulation in this field. If the judgment of the Supreme Court of Kansas, which we submit is incorrect, that this court has determined that the Natural Gas Act, [illegible] self-executing is allowed to stand, it will cast a shadow of doubt over existing and necessary state regulation. On the other hand an authoritative decision by this court that the Natural Gas Act was not self-executing will avoid a gap in regulatory authority. Federal Power Commission regulation, if and when it occurs, will, of course, supersede State regulation.

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[10] In addition to the State of Kansas the following states are believed to have market demands statutes which authorize regulatory bodies to limit production to coincide with market demands for the prevention of waste: Oklahoma, Texas, Alabama, Louisiana, Michigan, New Mexico, North Dakota, Florida, Arizona, Washington and North Carolina. Arkansas, Colorado, Wyoming, Nebraska and Mississippi have statutes of other type authorizing limitations on production for the purpose of preventing waste.

Literally hundreds of other orders have been entered in these states since 1938, all of which measures directly and substantially *affect* the price of gas in interstate commerce. If the enunciation by the Supreme Court of Kansas be the law, these many regulatory activities of the various states, as well as all severance tax laws, may also be considered as void *ab initio*.

Another serious problem involving validity of gas purchase contracts will be solved by an authoritative decision by this court. Under the terms of the Natural Gas Act, sales of gas by persons not possessing certificates issued by the Federal Power Commission were prohibited and were declared to be crimes. (15 U.S.C. 717f (c), 56 Stat. 83; 15 U.S.C. 717 t, 52 Stat. 833). Thus, if the Natural Gas Act was self-executing, every purchase contract entered into during the twelve years prior to certification in 1954 and 1955 was void and unforceable by either party. *Ewert v. Bluejacket*, 259 U.S. 129, 138; *McClellan v. Montana-Dakota Utilities Co.*, 104 F. Supp. 46, 55, aff'd 8 Cir., 208

Fed. 166 at p. 169; *Licznerski* v. *United States*, 3 Cir., 180 F.2d 862.

It was because of all of these foregoing implications that the Attorneys General of Kansas, Arkansas, Colorado. New Mexico, North Dakota, Oklahoma, Wyoming, and Utah filed a brief in the court below in support of the position of the Kansas Commission (R. 160, Appendix A, *infra*, p. A2, 184 Kan. at 541).

B. If Judgment of Court Below Determined Question upon Merits, Decision Is Probably in Conflict with Decisions of This Court.

1. State Power Continued Until the Exercise of Federal Power Commission Jurisdiction.

We believe that the opinion of the court below shows that the decision was limited to consideration of the effect of this court's previous decision, without consideration of the merits of the question presented. Certainly the opinion was so construed by the dissenting judge (R. 167, 175, Appendix A, *infra*. p. A8, 184 Kan. 545-550). If, however, the opinion be construed as a determination upon the merits that conflict between State regulatory authority under conservation statutes and Federal regulatory authority under the Natural Gas Act began upon mere enactment of the Natural Gas Act in 1938, such determination is probably in conflict with decisions of this court holding that in areas of concurrent jurisdiction and in the absence of clear expression of intent to preempt the field State authority continues until the *exercise* of Federal authority creates so direct and positive a conflict that the two cannot consistently stand together. *Missouri Pacific Railroad Co.* v. *Larabee Mills*. 211 U.S. 612; *N. W. Bell Telephone Company* v. *Nebraska Railway Comm'n.*, 297 U.S. 471; *Welch Co.* v. *New Hampshire*. 306 U.S. 79: *Kelley* v.

Washington, 302 U.S. 1; *Eichholz* v. *Public Service Comm'n*, 306 U.S. 268 (See Service Storage and Transfer Co. v. Commonwealth of Virginia, U.S. , 27 Law Week. 4230, 2 L. Ed. 2d 717).[11]

State conservation measures substantially affecting interstate commerce, including price fixing, had long before 1938 been held to be permissible as within the field of concurrent jurisdiction under the commerce clause. *Lacoste* v. *Depart. of Conservation*, 263 U.S. 545; *Champlin Rfg. Co.* v. *Commission*, 286 U.S. 210; *Bayside Fish Flour Co.* v. *Gentry*, 297 U.S. 422; *Thompson* v. *Consolidated Gas Co.*, 300 U.S. 55. That at one time the State could use minimum price regulation as a conservation tool is apparent from these cases. Accordingly, this court specifically approved a state minimum wellhead gas price regulation, such as involved here, as a conservation tool within the area of concurrent jurisdiction under the Commerce Clause. *Cities Service Co.* v. *Peerless Co.*, 340 U.S. 179.

Since the fundamental purpose underlying the Natural Gas Act was to complement such powers already possessed by the state and was intended in no manner to usurp state powers, *Power Comm'n* v. *Panhandle Co.*, 337 U.S. 498; *Panhandle Eastern Pipe Line Co.* v. *Public Service Comm.*, 332 U.S. 507, and cases cited therein at p. 520, the question now is: When was State power superseded, making the commission order inoperative?

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[11] Section 4 (c) of the Natural Gas Act (15 U.S.C., Sec. 717 (c), 52 Stat. 822, Appendix C, *infra*, p. A35) gave the Federal Power Commission power to prescribe rules and regulations within *such time* (not *before* August 21, 1938) as the Commission *might designate*. The Commission prescribed no rules and regulations for rate filing, fixed no time for filing and designated no forms for filing by independent producers until it issued its Order 174 on July 16, 1954 (19 Fed. Reg. 4534). It was authorized by Section 5 of the Act to fix rates "thereafter" to be observed (15 U.S.C., Sec. 717 d, 52 Stat. 823).

It is the position of the State of Kansas through its regulatory agency, that such State power, under the cases first cited under this section, was superseded only when the Federal Power Company first took any action regulating the same subject matter, which was in its Order 174 on July 16, 1954.

2. Case Is One for Application of "Operative Fact" Doctrine.

The decision of the court below, to the extent that it may be considered as deciding when the Kansas order became superseded, is believed also to be erroneous as conflicting with *Chicot Co. District* v. *Bank*, 308 U.S. 371 and *Labor Board* v. *Rockaway News Co.*, 345 U.S. 71, which hold that the existence of a statute, prior to a determination of unconstitutionality, is an "operative fact" and may have consequences which cannot justly be ignored and that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified.[12]

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[12] Federal Power Commission records reveal that pending the petition for review filed by respondent, every purchaser of gas from the Kansas Hugoton Field relied upon the validity of the Kansas order as the basis for rate increases. (For examples see R. 35-37, 57-69, 75-114.) Northern Natural Gas Company, Kansas-Nebraska Natural Gas Company and Kansas-Colorado Utilities, Inc., also relied upon the validity of the order in support of applications for increased intrastate rates subject to the utility jurisdiction of the Kansas Corporation Commission. (For an example, see R. 34-37, 39-57, 70-75, 96-100). In addition, every gas purchaser from the Kansas Hugoton Field, including respondent, complied with the Kansas order. (For respondent's reliance upon its compliance, see R. 91, 92, 93.)

C. Decision of Court Below Is in Conflict with Decisions of This Court As to Effect of Its Decisions.

1. Reversal Is Res Judicata Only of Questions Presented and Decided.

In a long series of cases this court has held that a reversal by this court is *res judicata* only of questions in terms discussed and decided, leaving open for decision by the state court every question not specifically decided. *Mutual Life Insurance Co.* v. *Hill*, 193 U.S. 551; *Wolff Packing Co.* v. *Indus. Court*, 267 U.S. 552; *Schneider Granite Co.* v. *Gust Realty Co.*, 245 U.S. 288; *Georgia Ry. E. L. Co.* v. *Decatur*, 297 U.S. 620; *Schuylkill Trust Co.* v. *Penna.*, 302 U.S. 506; *Sprague* v. *Ticonic Bank*, 307 U.S. 161.

The decision of the court below is believed to be directly in conflict with these decisions of this court.

In its decision the Kansas court recognized that the question of *when* the commission order became invalid had not been presented to this Court in the previous appeal, nor decided by it. It states:

> "Any question of the meaning of the order of that [this] court *should* have been raised with that [this] court by the parties to that appeal. We have not been advised whether appellants raised the point on rehearing which they now seek to *inject* into the case." (R. 166, Appendix A, p. A8, infra, 184 Kan. at 544. Italics added).

That the question had not been presented in the previous case was admitted by respondent, Cities Service Gas Company, in its brief in the Supreme Court of Kansas, after remand, wherein it stated:

> "At no time, until now, in brief, argument or otherwise, has the Appellee [Commission] made any contention that the order was valid, at least until

July 16, 1954. Here in its motion, and for the first time, the Appellee raises the issue." (P. 4, Memorandum of Appellant on Motions As to Form of Mandate, filed April 10, 1958, Case No. 40,402 in the Supreme Court of Kansas).

The effect to be given to this court's previous decision was necessarily governed by the rules of this court as to the effect of its decision. The Supreme Court of Kansas was not at liberty to ignore this court's rules as to the effect of its decisions as *res judicata* and to apply its own rule that a judgment is *res judicata* of every question which *could* have been decided.

2. This Court's Mandate Ignored.

In substituting its own rule for this court's rule as to the effect of the judgments of this court, the Supreme Court of Kansas ignored the plain words of the mandate requiring further proceedings as "according to right and justice and the constitution and laws of the United States, ought to be had herein, the said appeal notwithstanding." (R. 9).

3. Decisions of This Court Are Founded upon Situation at Time of Decision.

In a series of decisions extending as far back as *United States* v. *The Schooner Peggy*, 1 Cranch. (U.S.) 103 (1801), this court has stated that its judgments are based upon the situation existing on the date of the decision, giving effect to changes in both fact and law occurring since the entry of the order or judgment under review. *Vandenback* v. *Owens-Illinois Co.*, 311 U.S. 538; *Public Utilities Comm'n* v. *Gas Co.*, 317 U.S. 456; *Ziffrin, Inc.*, v. *United States*, 318 U.S. 73; *Hines* v. *Davidowitz*, 312 U.S. 60; *Watts*,

Watts & Co. v. *Unione Austrioca, etc.*, 248 U.S. 9, and cases cited.

Between the time of the entry of the commission order on December 2, 1953,[13] effective January 1, 1954 (Appendix B, *infra*, p. A18), and the 1958 decision and mandate of this court on the previous appeal, the Federal Power Commission, pursuant to this court's decision in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, decided June 7, 1954, first took action regulating the same subject matter through its Order 174 issued July 16, 1954, and this court then, *after* such F.P.C. assertion of jurisdiction, decided *Natural Gas Pipeline Co.* v. *Panoma Corp.*, 349 U.S. 44, on April 11, 1955. It was on the basis of these intervening events, and appellant's reliance thereon[14] after, but not before,[15] their occurrence, that this court struck down the Kansas order, citing only these two intervening cases. *Cities Service Gas Co.* v. *State Corporation Commission*, 355 U.S. 391.

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[13] A typographical error exists in the mandate, describing the date as December 8, 1956 (R. 8).

[14] Appellant's jurisdictional statement in the previous appeal specifically relied on the intervening F.P.C. action. It stated (pp. 13-14):

> "This Court takes judicial notice of orders of the Federal Power Commission which are published in the Federal Register (44 U.S.C.A. 307, 49 Stat. 502). It, therefore, knows that the Federal Power Commission, pursuant to this Court's mandate in the case of *Phillips* v. *Wisconsin, supra*, has issued its series of No. 174 orders, whereby the Federal Power Commission is currently regulating such sales of natural gas as are here involved in this case (Federal Register, Vol. 19, No. 141, p. 4534, published July 22, 1954; Fderal Register, Vol. 19, No. 156, p. 5081, published August 12, 1954; Federal Register, Vol. 19, No. 243, p. 8807, published December 23, 1954)."
>
> (Jurisdictional Statement of Appellant, Cities Service Gas Company, filed in February, 1957, No. 797, October term, 1956, which became No. 85, October Term, 1957.)

[15] Respondent first urged conflict with the Natural Gas Act on March 14, 1956 (R. 116-118). Its original pleadings, in-

Here again the Supreme Court of Kansas ignored this court's rule of decision and substituted its own rule that a review proceeding considers only validity of an administrative order as of the date of its promulgation and its converse that a judgment of invalidity necessarily means initial invalidity.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

J. Robert Wilson, General Counsel,
State Corporation Commission of Kansas,
State Office Building,
Topeka, Kansas,

Wayne Coulson, Counsel,
Dale M. Stucky, Counsel,
901 First National Bank Building,
Wichita, Kansas,

By Dale M. Stucky,
Attorneys for Petitioners.

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cluding a lengthy and detailed petition for rehearing of the order filed with the Commission on December 11, 1953 (R. 121-138), and its equally lengthy and detailed petition for judicial review filed in the District Court of Finney County on January 14, 1954 (R. 25-33), did not urge as a ground for attack conflict between the state order and the Natural Gas Act.

APPENDIX

APPENDIX A.

No. 41,284

Cities Service Gas Company, a Corporation, *Appellee*, v. State Corporation Commission of Kansas, Marion Beatty, Chairman, Richard C. Byrd and Harry G. Wiles, as Members of Said Commission, and Their Respective Successors in Office, *Appellants*.

SYLLABUS BY THE COURT

Gas—*Fixing Minimum Wellhead Price—Invasion of Federal Jurisdiction—Mandate of Supreme Court Construed.* In an appeal from the order of the district court construing the mandate of the Supreme Court of the United States, which mandate reversed the decision heretofore entered by this court in this case, it is now held that the reversal of said decision must be understood to hold that the order of the State Corporation Commission dated January 1, 1954, and fixing a minimum price for natural gas at the wellhead invaded the jurisdiction of the Federal Power Commission and was not within the jurisdiction of the State Corporation Commission to enter even though the Federal Power Commission had not exercised jurisdiction in the matter.

Appeal from Finney, district court; Roland H. Tate, judge. Opinion filed April 11, 1959. Affirmed.

Clyde E. Milligan, general counsel, State Corporation Commission, of Topeka, and *Wayne Coulson*, special counsel, of Wichita, argued the cause, and *Dale M. Stucky*, special counsel, of Wichita, was with them on the briefs for the appellants.

Mark H. Adams, of Wichita, and *Joe Ralston*, of Oklahoma City, Oklahoma, argued the cause, and *M. F. Cosgrove* and *Clayton E. Kline*, both of Topeka, and *Conrad C. Mount, O. R. Stites*, and *Charles V. Wheeler*, all of Oklahoma City, Oklahoma, were with them on the brief for the appellee.

John Anderson, Jr., attorney general, as *amicus curiae*, with whom the attorneys general of the states of Arkansas, Colorado, New Mexico, North Dakota, Oklahoma, Wyoming, Utah, and Texas joined in the brief.

The opinion of the court was delivered by

JACKSON, J.: In this appeal, appellants seek to have the court examine the mandate of the Supreme Court of the United States which reversed the decision of this court when the instant case was before the court in 1956 as found in *Cities Service Gas Co.* v. *State Corporation Commision*, 180 Kan. 454, 304 P. 2d 528. Since the detailed facts of this case were completely set forth in our former opinion, we shall not burden the record by detailing them here.

In our former decision the court held valid the order of the State Corporation Commission fixing a minimum price of eleven cents per thousand cubic feet, 14.65# p. s. i. a., at the wellhead for all persons, firms or corporations taking natural gas or causing gas to be taken from the Hugoton gas field in Kansas on or after January 1, 1954. As noted above, this decision was reversed by the Supreme Court of the United States in a per curiam opinion found in *Cities Service* v. *State Comm'n*, 355 U. S. 391, 2 L.Ed. 2d 355, 78 S.Ct. 381, rehearing denied 355 U. S. 967, 2 L.Ed. 2d 542, 78 S.Ct. 531, upon the basis that the regulation of the price of natural gas at the wellhead was within the exclusive jurisdiction of the Federal Power Commission.

The appellants here have urged the court that the Federal Power Commission did not take jurisdiction over the pricing of natural gas at the wellhead until June 7, 1954; that the production of gas at the well is not a matter of interstate commerce although it must be conceded that a price for such gas will be reflected in the prices charged for gas in interstate commerce and therefore, the price at the wellhead must be conceded to affect interstate commerce as that term is used in constitutional law. The corporation commission points out that at the time its order went into force on January 1, 1954, the Federal Power Commission had not exercised any authority over the price of natural gas at the wellhead in the Hugoton field, and that therefore, since the natural gas was not yet in interstate commerce, the state had power to regulate the price until the Federal Power Commission occupied the field citing *Missouri Pacific Ry. v. Larabee Mills*, 211 U.S. 612, 53 L.Ed. 352, 29 S.Ct. 214, and other cases.

The trouble with this contention is that our former decision was made in 1956 long after the decision of the case of *Phillips Petroleum Co. v. Wisconsin*, 347 U. S. 672, 98 L.Ed. 1035, 74 S.Ct. 794. In that case, the Supreme Court of the United States held that sales of natural gas owned by an independent producer at the month of an interstate pipe line were subject to regulation by the Federal Power Commission under the natural gas act of 1938. This case was decided on June 7, 1954, and it was after this decision that the Federal Power Commission began to assert authority to regulate the price of natural gas in Hugoton field. This court was not unmindful of that decision or of the dissent of Mr. Justice Douglas therein in which he said:

> "There are practical considerations which buttress that position and lead me to conclude that we should not reverse the Commission in the present case. If Phillips' sales can be regulated, then the Commission can set a rate base for Phillips. A rate base for Phillips must of necessity include all of Phillips' producing and gathering properties; and supervision over its operating expenses necessarily includes supervision over its producing and gathering expenses. We held in *Colorado Interstate Gas Co. v. Federal Power Commission*, 324 U. S. 581, that the Commission's control extended that far in the case of an interstate pipeline company which owned producing and gathering properties. And so it had to be, if regulation of the pipelines that owned their own gas supplies was to be effective. But an understanding of what regulation entails should lead to a different result in this case. The fastening of rate regulation on this *independent producer* brings 'the production or gathering of natural gas' under effective federal control, in spite of the fact the Congress has made that phase of the natural gas business exempt from regulation. The effect is certain to be profound. The price at which the *independent producer* can sell his gas determines the price he is able or willing to pay for it (if he buys from other wells). The sales price determines his profits. And his profits and the profits of all the other gatherers, whose gas moves into the interstate pipelines, have profound effects on the rate of production, the methods of production, the old wells that are continued in production, the new ones explored, etc. Regulating the price at which the *independent producer* can sell his gas regulates his business in the most vital way any business can be regulated. That regulation largely nullifies the exemption granted by Congress." (pp. 689-690.)

It might be said further that this court was not unmindful of the decision in *Natural Gas Co.* v. *Panoma Corp.*, 349 U. S. 44, 99 L.Ed. 866, 75 S.Ct. 576, where the Supreme Court of the United States held that:

> "A State may not fix a minimum price to be paid for natural gas, after its production and gathering has ended, by a company which transports the gas for resale in interstate commerce; *because such sale and transportation are subject to regulation by the Federal Power Commission exclusively.*" (Italics supplied.)

In fact, this court also was cognizant of the warning of the United States Supreme Court in the case of *Cities Service Co.* v. *Peerless Co.*, 340 U. S. 179, 95 L.Ed. 190, 71 S.Ct. 215, in which after holding a similar order of the state of Oklahoma valid in relation to due process as to a minimum price for natural gas at the wellhead, the court observed:

> "Appellant does not contend that the orders conflict with the federal authority asserted by the Natural Gas Act, 52 Stat. 821 (1938), 15 U. S. C. §§ 717 *et seq.* (1948). The Federal Power Commission has not participated in these proceedings. Whether the Gas Act authorizes the Power Commission to set field prices on sales by independent producers, or leaves that function to the states, is not before this Court." (p. 188.)

Despite all of these warnings and questions, this court in its former decision in this case felt that in view of the provisions of the natural gas act, the state still had a right to use the fixing of a minimum price at the wellhead as a means of conservation in the production of natural gas. The important question and the decision thereof by this court in its former opinion reads as follows:

> "It suffices to say, that after a careful analysis thereof, we have no difficulty in construing its terms

to mean that no person, firm or corporation—first of all the producer—can lift or take gas in its natural state from the depths of the Hugoton Field to a point further than the wellhead without, as a condition precedent to its withdrawal from the common source of supply, first attributing thereto a minimum price of not less than eleven cents per M. c. f. (14.65# p. s. i. a.). So construed, recognizing as we must that under our own decisions (*Kansas-Nebraska Natural Gas Co. v. State Corporation Commission*, supra; *LaHarpe* v. *Gas Co.*, supra) as well as those of the highest court of the land (see, e. g., *Thompson* v. *Consolidated Gas Co.*, 300 U. S. 55, 81 L.Ed. 510, 57 S.Ct. 364; *Interstate Gas Co.* v. *Power Comm'n*, 331 U. S. 682, 91 L.Ed. 1742, 67 S.Ct. 1482; *Cities Service Co.* v. *Peerless Co.*, 340 U. S. 179, 95 L.Ed. 190, 71 S.Ct. 215; *Phillips Petroleum Co.* v. *Oklahoma*, 340 U. S. 190, 95 L.Ed. 204, 71 S.Ct. 221) the Commission has power to regulate the physical production and gathering of natural gas in the interest of conservation, including the protection of correlative rights and the prevention of waste, the involved order falls squarely within the hereinafter emphasized excluding provisions of the Natural Gas Act (15 U. S. C. A. § 717[b]) which reads:

"'The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, *but shall not apply* to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution *or to the production or gathering of natural gas.*' (Emphasis supplied.)

"Thus, based on our construction of the order and since the Federal Act, as heretofore quoted, expressly provides that its terms shall not apply to the production of natural gas, it appears the trial court did not err in concluding the Commission's order should be upheld and sustained." (pp. 461-462.)

The decision by this court was reversed by the Supreme Court of the United States, see *supra*, the entire opinion reading as follows:

"PER CURIAM.

"The judgment is reversed. *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672; *Natural Gas Pipeline Co.* v. *Panoma Corporation*, 349 U. S. 44."

In reversing this holding, we understand the Supreme Court of the United States to hold that on January 1, 1954, the State of Kansas had no jurisdiction to regulate the price of natural gas as it came out of the gas well since that price would affect interstate commerce and the jurisdiction of the Federal Power Commission. Besides the other cases cited above, we are referred to the case of *Natural Gas Pipeline Co. of America* v. *Harrington*, 246 F. 2d 915, rehearing denied 253 F. 2d 231, certiorari denied 356 U. S. 957, 2 L.Ed. 2d 1065, 78 S.Ct. 992, in which we are shown that the second petition for rehearing raised before the court of appeals the question of the power of the state to regulate the price of natural gas until the Federal Power Commission had taken action. The court of appeals held that this question had been foreclosed by the decisions of the Supreme Court cited above and denied the rehearing.

It is felt that nothing is to be gained by laboring this question further. The question of the validity of the order of the corporation commission on January 1, 1954, was inherent in our former decision.

The mandate of the Supreme Court of the United States described our former decision as follows:

> " . . wherein the judgment of said Supreme Court affirming the judgment of the District Court of Finney County, Kansas, which upheld the validity of the State Corporation Commission order fixing a minimum price of eleven cents per thousand cubic feet, 14.65± p. s. i. a., at the wellhead for all persons, firms, or corporations taking gas or causing gas to be taken from the Hugoton Gas Field in Kansas on or after January 1, 1954, was duly entered on the 8th day of December A. D., 1956.
>
> . . . .
>
> "It is ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause be, and the same is hereby, reversed with costs."

Any question of the meaning of the order of that court should have been raised with that court by the parties to that appeal. We have not been advised whether appellants raised the point on rehearing which they now seek to inject into the case. From what has been said, it follows that the order of the district court now appealed from must be affirmed.

It is so ordered.

Fatzer, J., dissenting: With profound respect, I express my disagreement with the court's holding that the reversal of *Cities Service Gas Co.* v. *State Corporation Commission*, 180 Kan. 454, 304 P. 2d 528, by the *per curiam* opinion in *Cities Service* v. *State Comm'n*, 355 U. S. 391, 2 L.Ed. 2d 355, 78 S.Ct. 381, rehearing denied 355 U. S. 967, 2 L.Ed. 2d 542, 78 S.Ct. 531, requires the conclusion that the Kansas order in question was void *ab initio* on January 1, 1954.

Press of work makes impossible an extended dissenting opinion but I feel obligated to state my views to the extent time permits.

The constitution of the United States established a federal system of dual sovereignty. For purposes here concerned, federal jurisdiction consists of that conferred by the constitution and valid congressional enactments. Governmental powers not conferred upon the federal government by the constitution are reserved to the states respectively, or to the people. An essential feature of our dual system is that in some areas federal jurisdiction is exclusive; in others, state jurisdiction is exclusive, and still in others, federal and state jurisdiction is concurrent.

Situations of federal jurisdiction which led, to some extent, to the passage of the Natural Gas Act of June 21, 1938 (Ch. 556, 52 Stat. 821, 15 U. S. C. A. § 717) are found in *Missouri* v. *Kansas Gas Co.*, 265 U. S. 298, 68 L.Ed 1027, 44 S.Ct. 544, and *Pub. Util. Comm.* v. *Attleboro Co.*, 273 U. S. 83, 71 L.Ed. 549, 47 S.Ct., 294. Both cases held that exclusive jurisdiction over the rates of gas or electricity moving in interstate commerce was vested in the federal government by the constitution.

The legislative history of the Natural Gas Act has been detailed in a whole series of decisions by the supreme court of the United States (*Illinois Gas Co.* v. *Public Service Co.*, 314 U. S. 498, pp. 506-508, 86 L.Ed. 371, pp. 376, 377, 62 S.Ct. 384; *Power Comm'n* v. *Hope Gas Co.*, 320 U. S. 591, pp. 609-613, 88 L.Ed. 333, pp. 348-350, 64 S.Ct. 281; *Interstate Gas Co.* v. *Power Comm'n*, 331 U. S. 682, pp. 689, 690, 91 L.Ed. 1742, pp. 748, 749, 67 S.Ct. 1482; *Panhandle Pipe Line Co.* v. *Comm'n*, 332 U. S. 507, pp. 514-524, 92 L.Ed. 128, pp. 136-141, 68 S.Ct. 190; *Power Comm'n* v. *Panhandle Co.*, 337 U. S. 498, pp. 502-515, 93 L.Ed. 1499, pp. 1503-1510, 69 S.Ct. 1251). The principal function of the Act is to fix "just and reasonable" rates to protect consumers against exploitation at the hands of natural gas companies. However, in each of those cases it was specifically stated that, by the enactment of the Natural Gas Act, Congress did not intend the federal government to occupy the entire field of concurrent jurisdiction to the exclusion of the states and that state regulation of conservation of natural gas remain unimpaired. Illustrative of this fact is *Power Comm'n* v. *Panhandle Co.*, supra, wherein it was said:

> ". . . The Natural Gas Act was designed to supplement state power and to produce a harmonious and comprehensive regulation of the industry. Neither state nor federal regulatory body was to encroach upon the jurisdiction of the other. Congress enacted this Act after full consideration of the problems of production and distribution. It considered the state interests as well as the national interest. It had both producers and consumers in mind. Legislative adjustments were made to reconcile the conflicting views." (p. 513.)

In the Hope case, *supra*, it was held that the act conferred *no* federal power to use price as a conservation tool (pp. 608-610). On the other hand, it was specifically held in *Cities Service Co.* v. *Peerless Co.*, 340 U. S. 179, 95 L.Ed. 190, 71 S.Ct. 215, that the constitution did not preclude state power to use minimum wellhead *price* as a conservation tool. Thus, even after the Natural Gas Act was passed, state, and not federal power, had exclusive jurisdiction to use price as a *conservation* tool. There could be no conflict in the area of conservation. Hence, the state's use of wellheal price as a conservation tool could *only* conflict with federal authority if it hampered traditional federal *utility* regulation over wellhead price in determining just and reasonable rates for the purchase, transportation and sale of natural gas in interstate commerce for resale.

We have here the clearest possible example of a gas field over which there is concurrent state and federal jurisdiction. The state's power of conservation may be freely exercised unless and until it conflicts with the Federal Power Commission's jurisdiction in fixing just and reasonable utility rates for interstate pipe-line companies, as well as independent natural gas producers, for gas sold in interstate commerce and transported for resale in other states. The Kansas minimum wellhead price order operated only at the wellhead as a conservation measure, and only upon the producer. The Federal Power Commission first exercised jurisdiction over the wholesale of gas by independent producers on July 16, 1954 by its order No. 174 following *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672, 98 L.Ed. 1035, 74 S.Ct. 794, decided June 7, 1954. But, conflict between the two orders could not have antedated July 16, 1954, since the Federal Power Commission was given no power to reduce rates retroactively (15 U. S. C. A. § 717 [d]). (*Power Comm'n* v. *Hope Gas Co.*, supra; *Cities Service Gas Producing Co.* v. *Federal Power Com'n*, 233 F. 2d 726, p. 730).

With actual exercise of jurisdiction over independent producers by the Federal Power Commission already in effect, the supreme court of the United States reversed our decision in *Cities Service* v. *State Comm'n*, supra. The opinion simply states:

> "Per Curiam.
>
> "The judgment is reversed. *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672; *Natural Gas Pipeline Co.* v. *Panoma Corporation*, 349 U. S. 44."

The Phillips and Panoma cases each involved natural gas moving in interstate commerce *after both production and gathering had been completed.* We are left in the dark as to the supreme court's theory of the application of the rule of those cases to wellhead sales of natural gas governed by the Kansas minimum price order. It seems to me those cases fall in the class of *Missouri v. Kansas Gas Co.*, supra, and *Pub. Util. Comm. v. Attleboro Co.*, supra: a category over which the states never had jurisdiction.

Phillips decided that the Federal Power Commission had jurisdiction of the rates of all wholesales of natural gas in interstate commerce for resale, and by the time of Panoma (decided April 11, 1955) it had assumed that jurisdiction.

Had an opinion been written in our case (*Cities Service v. State Comm'n*, supra), the present controversy would likely have been decided before it arose, but, in the absence of an opinion, we are compelled to decide as best we can whether state power to establish a minimum wellhead price as a conservation measure was suspended by mere passage of the Natural Gas Act in 1938, or whether it became suspended when the Federal Power Commission first assumed jurisdiction over independent producers on July 16, 1954. The Natural Gas Act permitted the exercise of jurisdiction in the Federal Power Commission's discretion at any time *after* 60 days from June 21, 1938, as the commission should designate (15 U. S. C. A. § 717[c]). But, for a period of sixteen years federal power remained dormant. During that period hundreds of gas wells were drilled and gas sale and purchase contracts were entered into in good faith without Federal Power Commission approval or apparent need therefor. To hold that the Natural Gas Act was self-executing and in and of itself subjected wellhead sales to federal utility regulation is to indelibly impress the taint of illegality on all acts done by parties to those many contracts and renders them unenforceable by either buyer or seller. The Federal Power Commission was the agency designated by Congress to exercise and assert federal jurisdiction, and, until it did so, valid state conservation regulations, although based upon minimum wellhead price, were valid and enforceable. In the absence of the exercise of federal jurisdiction, and in the light of local exigencies, a state is free to act in order to protect its legitimate interests even though interstate commerce is directly affected (*Eichholz* v. *Comm'n*, 306 U. S. 268, 83 L.Ed. 641, 646, 59 S.Ct. 532).

In my judgment, the Kansas order was a valid exercise of the regulatory power of the state until suspended and made inoperative by the Federal Power Commission's exercise of its paramount authority on July 16, 1954. Such a construction is consistent with the authorities cited above and permits an orderly, uniform and consistent pattern of state, followed by federal, regulation of *price* of natural gas at the wellhead. A contrary decision creates a gap between the exercise of valid state and valid federal regulatory power; renders a state powerless to exercise regulatory power over matters of local concern because of the possibility of subsequent judicial determination of "direct and positive" conflict with the "dormant and unexercised" regulatory power of a federal agency, and casts doubt upon and clouds the validity of presently existing state laws. In *Missouri Pacific Ry.* v. *Larabee Mills*, 211 U. S. 612, p. 623, 53 L.Ed. 352, 29 S.Ct. 214, it was said:

> ". . . the mere grant by Congress to the commission of certain national powers . . . does not of itself and in the absence of action by the commission interfere with the authority of the State to make those regulations conducive to the welfare and convenience of its citizens. . . ." (p. 623.)

To the same effect are *N. W. Bell Tel. Co.* v. *Ry. Comm'n*, 297 U. S. 471, 80 L.Ed. 810, 56 S.Ct. 536; *Welch Co.*

v. *New Hampshire*, 306 U. S. 79, 83 L.Ed. 500, 59 S.Ct. 438, and *Eichholz* v. *Comm'n*, supra.

The reversal of our case by the supreme court of the United States unquestionably determined that the Kansas order was invalid because of conflict with the *exercise* of federal jurisdiction under the Natural Gas Act. Except for one possessing powers of clairvoyance the case decided nothing more. More specifically, it did not decide, in my judgment, *when* conflict between state and federal jurisdiction arose. The effect of the reversal must be determined in light of the rules of the supreme court of the United States as to its own judgments. Two rules have been consistently stated: (1) Cases are decided upon the basis of the situation existing at the date of decision, taking into account both factual and legal changes in circumstances pending the proceedings (*Watts, Watts & Co.* v. *Unione Austriaca &c.*, 248 U. S. 9, 63 L.Ed. 100, 39 S.Ct. 1; *Vandenbark* v. *Owens-Illinois Co.*, 311 U. S. 538, 85 L.Ed. 327, 61 S.Ct. 347), and (2), *reversals determine only questions discussed and decided* (*Wolff Packing Co.* v. *Indus. Court*, 267 U. S. 552, 69 L.Ed 785, 45 S.Ct. 441; *Schuylkill Trust Co.* v. *Penna.*, 302 U. S. 506, 82 L.Ed. 392, 58 S.Ct. 295).

With respect to those rules, what was the federal question presented and decided in *Cities Service* v. *State Comm'n*, supra? That question was succinctly stated by Cities Service in its notice of appeal to the supreme court of the United States in that case, as follows:

> "III
>
> "The following Federal question only is presented by this appeal:
>
> "Whether the State Corporation Commission of Kansas has the jurisdiction and authority in face of

the provisions of the Natural Gas Act (15 U. S. C. A. 717, 62 Stat. 821), *and the jurisdiction of the Federal Power Commission thereunder*, to fix a minimum price for natural gas produced and sold in the Kansas-Hugoton Gas Field by producers therein to Appellant, a natural gas company, either at the wellhead or in said field after production and gathering thereof has been completed, or both, for transportation and resale in interstate commerce, or to prohibit the production of such natural gas by said producer, or inflict severe penalties therefor, if the price fixed by such order for such gas is not paid by the purchaser or taker thereof to the producer." (Emphasis supplied.)

In its brief in the present appeal, Cities Service states:

> "This was the question (quoted above) decided by the Court. . . ."

Thus, the *only* federal question presented in *Cities Service* v. *State Comm'n* and decided by the supreme court of the United States is the one quoted above. I do not believe it may be correctly stated that the federal question presented in that appeal involved the issue of *when* federal jurisdiction under the Natural Gas Act conflicted with the state conservation regulation in question. That point *was not* presented in that appeal and the judgment of reversal by the *per curiam* opinion may not, in my judgment, be construed to indicate the Kansas order was invalid and unenforceable on January 1, 1954. While that date appears in the recitals of the mandate, the judgment portion of the mandate reversing our case was clear and unambiguous, and did not state that the Kansas order was void *ab initio* on January 1, 1954. As previously indicated, that precise question was not presented in that appeal.

I do not read a deviation from the foregoing conclusions into *Michigan Wis. Co.* v. *Corp. Comm'n*, 355 U. S. 425, 2

L.Ed. 2d. 412, 78 S.Ct. 409. That case and the three decided with it were later appeals involving the order in *Natural Gas Co. v. Panoma Corp.*, 349 U. S. 44, 99 L.Ed. 866, 75 S.Ct. 576. Following reversal of Panoma by the supreme court of the United States, the supreme court of Oklahoma, conforming to the mandate, set aside the Oklahoma minimum price order as to sales *after gathering*, but left it in effect as to *wellhead* sales. Pending the second appeal to the supreme court of the United States in Panoma (*Michigan Wis. Co.* v. *Corp. Comm'n*, supra) the reversal of *Cities Service* v. *State Comm'n*, supra, determined that the holding of the first Panoma decision applied not only to the point where gathering ended, but extended to the point of production—the wellhead itself.

Since the sales involved in Panoma were not wellhead sales, the supreme court of Oklahoma apparently felt that the Panoma case left the status of the minimum *wellhead price* portion of the Oklahoma order still valid. In my judgment, the Michigan Wis. Co. case, deciding the second Panoma appeals, is similar to *Wolff Packing Co.* v. *Indus. Court*, supra. The procedure of determination by the state supreme court of questions not expressly decided by the previous reversal, was approved, but in making its second decision, the supreme court of Oklahoma made an erroneous decision on the merits, that is, that federal jurisdiction only extended to where gathering ended, which was again reversed on the merits (*Cities Service* v. *State Comm'n*, supra), and not for failure to comply with the mandate on the first appeal.

I agreeably accept decisions of the supreme court of the United States, but I do not believe that court has squarely determined the present question, however, my colleagues feel otherwise. If a majority were to agree with my conclusions, and we incorrectly decided that the judgment of reversal in our case (*Cities Service* v. *State Comm'n*, supra) did not import a determination that the Kansas minimum price order was void *ab initio* on January 1, 1954, our error may readily be corrected upon appeal to the supreme court of the United States. On the other hand, if we forego that conclusion, out of an excess of caution to not intrude upon the mandate of the supreme court of the United States, our own error may be corrected only upon *certiorari*, in which the governing factors are not the correctness or incorrectness of our decision, but whether the question is of such national importance as to entitle the case to review in competition with hundreds of other cases.

Although fully cognizant of the holding and statements so ably set forth in the court's opinion, I would nevertheless reverse the judgment with instructions to vacate the State Corporation Commission's order from and after July 16, 1954, the date when the Federal Power Commission first exercised jurisdiction over independent gas producers in the Hugoton Gas Field following the decision in Phillips on June 7, 1954. As previously indicated, this conclusion permits an orderly, uniform and consistent pattern of state, followed by federal, regulation of price of natural gas at the wellhead.

APPENDIX B.

BEFORE THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS

In the matter of the application of certain royalty owners in the Hugoton Gas Field requesting orders as to a fixed price and measurement regulations in said Hugoton Gas Field.

DOCKET NO. 44,079-C
(C-3216)

CONSERVATION
DIVISION

ORDER

Now on this 2nd day of December, 1953, the above-entitled matter comes before the Commission for further consideration and final disposition. The Commission, having examined the petition, files and record, and being fully advised in the premises, finds:

1. That the petition herein was filed by the Southwest Kansas Royalty Owners Association, a non-profit corporation, and certain individuals who are the owners of minerals in place or royalty interests in the Hugoton Gas Field, and that it is a petition for a new minimum wellhead price in said field of 14 cents per M.c.f. on a pressure basis of 16.4 pounds per square inch or in the alternative not less than 12 cents per M.c.f. measured on a pressure basis of 14.65 pounds per square inch.

2. That after due notice a public hearing was scheduled at the Allis Hotel, Wichita, Kansas, on September 26, 1952, at which time on motion of certain intervenors the matter was continued to October 20, 1952, In Topeka, and

that hearings were held thereon at Topeka on October 20, 21, 22 and 23, 1952, December 15, 16, 17, 18 and 19, 1952, and January 14, 15 and 16, 1953.

3. That appearances were entered on behalf of the following: Southwest Kansas Royalty Owners Association and certain individual petitioners by Howard T. Fleeson, Dale M. Stucky, both of Wichita, and A. E. Kraemer, Hugoton, their attorneys; Northern Natural Gas Company by its attorneys Lawrence I. Shaw, Omaha, Nebraska, and Mark Adams, Wichita; Panhandle Eastern Pipe Line Company by its attorneys Edward H. Lange, Kansas City, Missouri, Louis R. Gates, Kansas City, Kansas, and Mark Adams, Wichita; Cities Service Gas Company by its attorneys O. R. Stites, Sr., and Joe Ralston, both of Oklahoma City, Oklahoma, Mark Adams, Wichita, and O. R. Stites, Jr., of Topeka; Kansas-Nebraska Natural Gas Company by its attorneys James Conway, Hastings, Nebraska, and M. F. Cosgrove, Topeka; Kansas-Colorado Utilities by its attorney Harold Bolton, Abilene. Other appearances include: Consumers Cooperative Association, *et al.* by their attorney Phillip Dergeance, Lawrence; Lehigh Portland Cement Company by its attorney Frederick G. Apt, of Iola, and R. F. Jones; Coleman Company of Wichita by A. A. Knapp; the Office of Price Stabilization by its attorney Frank Theis of Arkansas City; the Eastern Kansas Gas Company of Iola, by J. H. Page and John McNally, both of Iola; Kansas Association of Municipal Utilities by its attorney Charles W. Lower, Kansas City, Kansas. That the following attorneys appeared on behalf of cities of Kansas as their respective city attorneys: James W. Wallace, Scott City; C. J. Brenneisen, Kansas City, Kansas; O. C. Jordan, Beloit; Casey Jones, Hill City; Corwin Spencer, Oakley; H. D. Oelschaeger, Plainville; Max Jones, Goodland; Sam W. G. Lowe, Colby; F. A. Sloan, Hoxie; Charles

Stough, Lawrence and Fred W. Aley, Wichita; that James A. McClure, Robert L. Webb, Ralph W. Oman, all of Topeka, and Jerome M. Joffee of Kansas City, Missouri, [since deceased] appeared, representing a group of protesting cities. Jay Kyle, General Counsel and R. C. Woodward, Special Counsel, appeared for the Commission and the public generally. That the Commission has jurisdiction of the subject matter and of the parties.

4. That since the public hearings referred to in Finding No. 2, the Commission entered an order on May 20, 1953, in its Docket No. 34,780-C (C-1825) changing the definition of "Gas, Cubic Foot," as defined by Commission Rule 82-2-201 adopted December 24, 1947, and on file with the Revisor of Statutes pursuant to Laws 1947, Chapter 440. That said order made specifc findings relating to the obsolence of its former rule relating to "Gas, Cubic Foot," which was statewide in its application, and as a result thereof adopted a new definition of "Gas, Cubic Foot," pursuant to its statutory authority (G. S. 1949, Chapter 55, Article 7, as amended). That said definition applies to each and every gas field in the State of Kansas except those wells specifically prohibited from regulation by the proviso in G. S. 1949; 55-703, and applies to all withdrawals of gas in the State of Kansas since July 1, 1953, 12:01 a. m.; said rule as amended is currently on file with the Revisor of Statutes in accordance with G. S. 1949, 77-405 et seq.

5. That in Docket No. 35,154-C (C-1868) on February 18, 1949, the Commission promulgated an Interim Order, in which findings included *inter alia* that in the interest of conservation the fair and reasonable minimum price of natural gas at the wellhead in the Hugoton Field should be eight cents (8¢) per M.c.f., and that all takers of gas from said field would attribute thereto for purposes of payments

to producers, landowners, lease owners and royalty owners, the fair and reasonable minimum price of eight cents (8¢) per M.c.f. at the wellhead until further order of the Commission in the investigation instituted by it in Docket No. C-164.

6. That subsequent to the Interim Order dated February 18, 1949, Kansas-Nebraska Natural Gas Company and Northern Natural Gas Company filed applications for judicial reviews thereof in the District Court of Finney County, Kansas, under the provisions of the Laws of 1945, Chapter 233, Section 9; that likewise, under the same authority, Panhandle Eastern Pipe Line Company brought a similar action in the District Court of Seward County, Kansas; and that Cities Service Gas Company filed a complaint against the Commission in the United States District Court for the District of Kansas, which subsequently was dismissed by that company. The three cases in the state courts were consolidated for hearing before the District Court of Finney County sitting both in the capacity of Judge of Finney County District Court and Judge *pro tem* of Seward County District Court. From adverse decisions in the district courts, all three takers of gas (Kansas-Nebraska, Northern and Panhandle)) took appeals to the Supreme Court of Kansas, which upheld the district courts and sustained the Commission's authority to establish the minimum wellhead price of eight cents (8¢) per M.c.f.; (*Kansas-Nebraska Natural Gas Co.* v. *State Corporation Commission*, 169 Kan. 722). The three appellants subsequently filed motions for rehearing which were denied by the Supreme Court, (*Kansas-Nebraska Natural Gas Co.* v. *State Corporation Co.*, 170 Kan. 341). Following the two Supreme Court decisions just referred to, the Commission in the original docket by appropriate order dated February 21, 1951, promulgated

an implementing order to its Interim Order and later entered an Order Nunc Pro Tunc on March 8, 1951, in said docket, to correct an error in its order of February 21, 1951. The Commission, at the time it entered its Interim Order of February 19, 1949 wrote a Memorandum Opinion under date of February 23, 1949, which related some of the history of the field, the powers of the Commission and generally the Commission's jurisdiction over the conservation of this irreplaceable natural resource and the production of gas in the Hugoton Field of Kansas. It would be unnecessarily repetitious to set out here the contents of that Memorandum Opinion.

7. That the proceeding in this docket is not a rate matter.

8. The Commission as of this date has entered in this docket a Memorandum Opinion which should be incorporated herein and made a part of this order by reference.

9. That because of the voluminous record and the widespread interest in the subject matter, not only in the interest of conservation and protection of correlative rights but also because of the possible effect the decision herein may have on certain classes of rates to consumers, we have felt impelled to re-examine the question of a reasonable minimum wellhead price structure in the Kansas Hugoton Gas Field which is now furnishing gas to more than one-fourth of the states of the Union.

10. It is not disclosed by the record before us that the eight-cent (8¢) price adopted by the Commission through its Interim Order of February 18, 1949, and now in effect, has had any adverse effect upon marketing or marketing conditions in the field or that it has adversely affected ultimate domestic consumer rates. Promulgation of a minimum

price is a paramount factor in conservation and the protection of correlative rights. Having a low value in the stages of production, gas can be used uneconomically and wastefully because of the low commercial price being paid at the wellhead That an important source of gas for the economy of not only Kansas but many other states is the Kansas portion of the Hugoton Gas Field; that gas is not now competitive with other fuels, namely, oil and coal; that the cheapness of gas is conducive to waste as prohibited by statute.

11. That conditions exist which, coupled with known differentials in transportation costs, adversely affect correlative rights.

12. Public records of this Commission clearly indicate, that since February, 1948, the number of wells in the field has more than tripled, and that ultimate development of the field is rapidly approaching. All of this leads to the inevitable conclusion that withdrawals from the field are nearing their peak, and also carries the warning that practices of conservation must be heightened if the public is to enjoy the fullest recovery of gas from the Hugoton Field.

13. A true stimulant to conservation is price, and a low price is conducive to waste which is specifically prohibited by G. S. 1949, 55-701. Experience in the Hugoton Field since 1949, the year of the first minimum wellhead order, has shown that a floor price in the interest of conservation supports the concept of conservation by economic uses and the avoidance of waste. It is apparent this can be best accomplished through a realistic minimum field price for this precious fuel.

14. Since price is a prime factor in avoiding various types of waste, strengthening that factor strengthens conservation in the Hugoton Field.

15. The minimum price of eight cents (8¢) per M.c.f. at the wellhead adopted by the Interim Order of February 18, 1949, is not now an effective conservation measure for the various reasons amplified in the Memorandum Opinion.

16. That a fair and reasonable minimum wellhead price to be attributed to all gas taken from the field, except gas used for lease operations, is in the public interest and welfare, encourages conservation, furthers the avoidance of discrimination and helps to promote orderly development and exploration.

17. That currently a fair and reasonable minimum price for gas at the wellhead in the Hugoton Field is eleven cents (11¢) per M.c.f. (14.65 pounds p.s.i.a.).

18. That all persons, firms or corporations which take gas or cause gas to be taken from the Kansas Hugoton Gas Field on and after January 1, 1954, 12:01 a. m., should be required, as a condition precedent for withdrawal from the common source of supply, to pay or attribute to all gas taken, except gas for the operations of leases, for all purposes including payments to producers, landowners, lease owners and royalty owners, the fair and reasonable minimum price of not less than eleven cents (11¢) per M.c.f. (14.65 pounds p.s.i.a.) at the wellhead.

19. That the petition herein should not be granted on either basis requiested.

IT IS, THEREFORE, BY THE COMMISSION ORDERED: That the Memorandum Opinion entered herein this date be, and the same is, hereby incorporated and made a part of this order by reference.

IT IS FURTHER BY THE COMMISSION ORDERED: That the petition herein be, and the same is, hereby denied.

IT IS FURTHER BY THE COMMISSION ORDERED: That all persons, firms or corporations which take gas or cause gas to be taken from the Hugoton Gas Field in Kansas on and after January 1, 1954, 12:01 a. m., shall, as a condition precedent for withdrawal from the common source of supply, pay or attribute to all gas taken, except gas for the operations of leases, for all purposes including payments to producers, landowners, lease owners and royalty owners, the fair and reasonable minimum price of not less then eleven cents (11¢) per M.c.f. (14.65 pounds p.s.i.a.) at the wellhead until further order or orders of this Commission.

The Commission retains jurisdiction of the subject matter and the parties for the purpose of entering such further order or orders, and promulgating and implementing such further rules and regulations as from time to time it may deem proper.

BY THE COMMISSION IT IS SO ORDERED.

RAYMOND B. HARVEY,
Raymond B. Harvey,
Secretary.

(SEAL)

APPENDIX B. Continued.

BEFORE THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS

In the matter of the application of certain royalty owners in the Hugoton Gas Field requesting orders as to a fixed price and measurement regulations in said Hugoton Gas Field.	)	DOCKET NO. 44,079-C (C-3216) Conservation Division

MEMORANDUM OPINION

BY THE COMMISSION:

Our position respecting the attribution of a minimum wellhead price for natural gas from a common reservoir is so patent that we do not propose here to elaborate extensively on the subject matter. In the Memorandum Opinion entered on February 23, 1949, in Docket No. 35,154-C (C-1868), we set out our views at length when Kansas was pioneering in adoption of a minimum wellhead price as a conservation measure for an important irreplaceable natural resource.

That the State has a right, in the interest of conservation, to fix a minimum wellhead price for natural gas in a common source of supply, if the evidence justifies the conclusion that such an order is necessary to prevent waste and protect correlative rights, is now settled law. (*Kansas-Nebraska Natural Gas Co. v. State Corporation Commission*, 169 Kan. 722, 222 P. 2d 704, and 170 Kan. 341, 225 P. 2d 1054; *Phillips Petroleum Company v. State of Oklahoma*, 340

U. S. 190, 71 S.Ct. 221, 95 L.Ed. 204; *Cities Service Gas Company* v. *Peerless Oil and Gas Co.*, 340 U. S. 179, 71 S.Ct. 215, 95 L.Ed 190.)

In the docket to which we have here referred, after protracted hearings we promulgated an interim order on February 18, 1949, establishing a minimum wellhead price of eight cents (8¢) per M.c.f. for gas in the Kansas portion of the Hugoton Gas Field. The eight-cent (8¢) figure prevails at this writing. In the Memorandum Opinion we said:

> "The evidence offered at the hearings in this proceeding is not sufficient to permit us to determine finally what a reasonable and fair minimum fixed price at the wellhead should be in the field."

By separate order on the same day we instituted our own investigation of prices being paid at the wellhead in the field.

By order of May 2, 1951, Docket 35,154-C (C-1868) and Docket C-164, the Commission closed that investigation assigning as reasons therefor in substance: that because of the long lapse of time resulting from litigation and the changes meanwhile, in field conditions and development, and in marketing and conservation practices, much of the evidence at the hearing had become obsolete, lacked continuity and had become of questionable significance in determining a reasonable minimum price. We, however, said in that order:

> "If upon further consideration * * * it is deemed appropriate in the interest of conservation * * * to explore current factors and prevailing trends regarded as necessary in the determination of a minimum value other than 8 cents * * * the institution of a new inves-

tigation would be more feasible, beneficial and practical * * *."

The Commission never instituted a new investigation on its own motion, but it did use the instant docket for the purpose of making a very comprehensive and exhaustive study of the entire matter, allowing all persons having any possible interest in the matter, to present their evidence. Certain interests attempted to have the instant hearing limited to the period of time since March 1, 1949, the effective date of the Interim Order. The Commission, however, refused to so limit it and conducted the hearing as if the whole matter were being considered *ab initio.*

The history of these proceedings forcibly leads to the conclusion that we used in our Interim Order the very least possible minimum price then determinable and intimated that further study could well demonstrate that a higher minimum price was reasonable and necessary.

To disregard the preponderance of evidence before us now would in effect be finding that the eight-cent minimum price has accomplished in the prevention of waste all that any minimum price could accomplish and that no waste, physical, economic or other is now occurring in the field which any minimum price could prevent.

Before us is an application requesting a new minimum wellhead price for natural gas in the Kansas Hugoton Gas Field of fourteen cents (14¢) per M.c.f. on a pressure basis of 16.4 pounds p.s.i.a. or in the alternative not less than twelve cents (12¢) per M.c.f. measured on a pressure basis of 14.65 pounds p.s.i.a.

Prior to the filing of the application on August 18, 1952, we had been giving informal consideration and study as to whether or not the adopted minimum wellhead price of eight cents (8¢) per M.c.f. in the field was efficacious. We have reached the conclusion that it is not.

The vastness and importance of the Hugoton Gas Field to Kansas requires our every-day attention. It must be remembered that the field, approximately sixty-five per cent of which underlies nine southwestern Kansas counties, also extends into the states of Oklahoma and Texas. In February, 1948, the public records of this Commission disclose there were 985 wells in the Kansas portion of the field, whereas in November, 1953, there were 3,065, an increase of more than 300%, with more wells drilling. It is readily seen that there are ever-changing conditions in the field and conditions that exist now affecting conservation which were not conceivably involved in the hearings in 1948, relative to Docket No. 35,154-C (C-1868). With the greater number of wells in the field today, the public interest becomes all the more pronounced in the conservation of this precious fuel. We therefore are aware at all times of the realistic circumstances through which gas is withdrawn from the producing horizons of that field.

In this docket we have held extensive public hearings consuming twelve days and one night session. The transcript of these proceedings covers 2,284 pages and seventy exhibits were offered. The applicants produced an abundance of testimony as did certain of the protestants which included pipeline companies and representatives of gas consumers in the state. We have painstakingly reviewed the transcript of all the testimony and have arrived at the conclusion that the preponderance of evidence is that the prevailing minimum wellhead price in the Hugoton Gas Field is obsolete and that we should adopt a new wellhead price in the interest of protecting the public from dissipation of this irreplaceable natural resource, to carry out our statutory duties in the avoidance of waste and to protect correlative rights.

In this Memorandum Opinion, as we indicated, we do not intend to write a dissertation on the subject of minimum wellhead prices as conditions precedent for withdrawing gas from a common source of supply, but there are a few inescapable deductions that cannot be refuted which we wish to observe in passing.

The first deduction remains today, as was pointed out in our Memorandum Opinion of February 23, 1949, that gas is not truly competitive with the two other main fuels; namely, coal and oil. The cheapest and most efficient of the three fuels, gas is more convenient in more uses to the consumer than are the others. This is all borne out by the record. Gas is a commodity. Cheapness of a commodity is an avenue to ultimate waste. It is common knowledge that the records of every pipeline company and distributing company are replete with astonishing numbers of conversions from other fuels to natural gas where it is available.

Thus if the minimum wellhead price of natural gas is permitted to remain too low, effectiveness in achieving its objective as a conservation measure is thwarted.

Second, it cannot be factually disputed that the Kansas portion of the Hugoton Gas Field is in closer proximity to the markets in the North, East and West; namely, Kansas, Colorado, Wyoming, Nebraska, South Dakota, Minnesota, Iowa, Missouri, Illinois, Indiana, Pennsylvania, Ohio and Michigan, than those portions lying in the other states which comprise the Hugoton Gas Field in its entirety. The essence of that fact is that the cost of the transportation of gas to these markets from Kansas is less than from either Oklahoma or Texas. If the minimum wellhead price of gas is lower, less the differential in transportation and other items, there exists clearly a violation of correlative rights and the resultant discrimination is conducive to waste for apparent reasons. Anyone familiar with the Hugoton Gas Field knows that situation prevails today. If such a situation continues to exist, it is obvious as a matter of economics that it will lead to earlier depletion of the Kansas wells, thus violating correlative rights and making disproportionate withdrawals possible.

Gas nearer the markets should command a higher price. Northern Natural Gas Company, a protestant here and a large taker from the field, is now paying a much higher price for its Permian Basin, Texas and New Mexico) gas delivered to Skellytown, Texas, yet its markets are in Minnesota, Iowa, South Dakota, Nebraska and Kansas. (Less than 4% in Kansas)

There is another observation that we wish to make. Certain of the protestants here have been under the impression that this was a rate case. That assumption is erroneous. Therefore, the testimony on behalf of these protestants is not germane to the issue of conservation. We conducted these proceedings as the gas conservation agency of the state under G. S. 1949, Chapter 55, Article 7, and not as the public regulatory body as provided by G. S. 1949, Chapter 66. Only one of the distributing companies in the state and three others which are both pipeline companies and distributing companies, participated in these proceedings. It is significant that neither of the two largest gas distributing companies in Kansas and others assumed that this was a rate case.

It is true that this Commission, as a public regulatory body, has rate-making authority within the state of Kansas but does not possess nor seek to possess jurisdiction over rates for the sale of natural gas in interstate commerce. The theory pointing to the arguments in the record respecting rates must be dispelled. In adopting a minimum well-head price for the Hugoton Gas Field in Kansas, we look exclusively to the interest of the public in conservation.

All the factors which supported the eight-cent (8¢) minimum price in 1949 will, in the light of further consideration, support a higher minimum now.

Some inequities were corrected by the Interim Order, but others still exist. Some purchasing companies, after the minimum eight-cent order voluntarily adjusted their prices even on old contracts, somewhat above eight cents. Others did not. That eight cents is not now a reasonable minimum price is evidenced by the fact that practically all new contracts have been made at higher prices and many old contracts changed to more than eight cents.

Since the minimum eight-cent order in 1949, there has been a marked increase in the cost of development, an increase in the number of wells in the field, a change in the amount and nature of the demand for gas with an exceptionally great increase in the demand for space heating; additional pipelines have been built and new markets added.

It is an accepted fact that increase in storage fields has made pipeline companies less dependent on industrial loads to maintain good load factors; consequently there is less reason for extremely low prices to industries. As an illustration of this factor, Cities Service Gas Company, currently the largest taker from the field, has developed underground storage facilities extensively in Kansas. A recent development is the Colony Gas Field in Anderson

County, Docket No. 44,080-C (C-3217). One of its large distributing companies, Union Gas System, Inc., has pioneered in underground reservoirs in southeastern Kansas, and now employs such facilities to augment its normal pipeline withdrawals. Other pipeline takers have underground storage space beyond the borders of the state or are in the process of acquiring such facilities.

And too, increase in source cost (price) of gas has not kept pace with increase in source prices of other fuels because owners of land and producers of gas have no freedom of contract.

The field has now developed to the extent that there is not enough undedicated acreage to warrant any new pipelines and no reason to expect any advance in price by reason of competition.

The evidence disclosed that wellhead prices of gas have been increased in Ohio, Texas, New Mexico, West Virginia, Oklahoma, the Gulf Coast area, and practically all producing states and in relatively unimportant, small fields.

As has been noted, we adhere to our conclusions in the Memorandum Opinion of February 23, 1949, in all respects except it is our position after study and research that today, under the prevailing conditions, the eight-cent (8¢) per M.c.f. minimum price adopted in 1949 is neither fair nor reasonable.

Finally, it is now fundamental and accepted that price is a dominant medium to conservation. We are not here fixing a price for gas in the field, a maximum price, a fair field price or a going price, but we are prescribing a minimum price for all gas, except for lease usage, of eleven cents (11¢) at the wellhead on a pressure base of 14.65

pounds p.s.i.a. *as a condition precedent for withdrawals from the common source of supply, in the interest of conservation.*

An appropriate order in conformance with the views heretofore expressed will be entered in this docket as of this day.

RAYMOND B. HARVEY,
Raymond B. Harvey,
Secretary.

(SEAL)
Topeka, Kansas
December 2, 1953

APPENDIX C.

Section 4(c) of Natural Gas Act.

"(c) Under such rules and regulations *as the Commission may prescribe*, every natural-gas company shall file with the Commission, *within such time* (not less than sixty days from June 21, 1938) and *in such form as the Commission may designate*, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services." (15 U. S. C. Sec. 717c (c); 52 Stat. 822, Italics added.)

APPENDIX D.

UNITED STATES OF AMERICA FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Claude L. Draper, Nelson Lee Smith and Seaborn L. Digby.

In the Matter of Compliance by natural-gas producers and gatherers with certificate and rate requirements.	Docket No. R-138.

ORDER No. 174.

Regulations Governing the Filing of Rate Schedules and Applications for Certificates of Public Convenience and Necessity by Producers and Gatherers of Natural Gas Which Are Also Natural Gas Companies, and Waiver of Accounting Requirements.

All natural-gas companies subject to the Natural Gas Act are required by Section 7 thereof to obtain a certificate of public convenience and necessity before engaging in or discontinuing any transportation or sale of natural gas subject to the jurisdiction of the Commission, and by Section 4 of the Act they are required to file schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission. These companies are also subject to the jurisdiction of the Commission as to their accounts and reports. The decision of the United States Supreme Court on June 7, 1954 in *Phillips Petroleum Company* v. *Wisconsin et al.* (347 U.S. 672), holds that persons engaged in the production and gathering of natural gas but which also transport natural gas in interstate commerce or makes sales in interstate commerce for resale are "natural-gas companies" subject to all the requirements of the Natural Gas Act. This decision affirms the decision of the United States Court of Appeals for the District of Columbia Circuit in *Wisconsin* v. *F.P.C.*, 205 F. 2d 705 (May 22, 1953), and reverses the holding of the Commission in Opinion No. 217, *Phillips Petroleum Company*, August 22, 1951 (90 P.U.R. (N.S.) 325).

The rules and regulations heretofore adopted by the Commission pursuant to Sections 4 and 7 of the Act have been directed principally to interstate pipeline companies. Those producers and gatherers which come within the class found by the United States Supreme Court in the *Phillips* case to be subject to the Commission's jurisdiction should be afforded a reasonable opportunity to comply with the requirements of the Act to the end that the regulatory objectives of Congress may be achieved within the shortest feasible time. Also, in the interest of consumers, natural-gas companies and the public generally, practical considerations require us to deal with current problems which confront us as a consequence of the Court's decision and a reasonable cut-off date should be fixed in order to avoid confusion in attempting to readjust past transactions. Therefore, we have determined to provide in the first instance, and subject to our further order, reasonably simple rules and regulations applicable to these companies. For these and other reasons, good cause exists for making the rules and regulations herein adopted effective on less than 30 days' notice and for making such rules and regulations applicable to transactions and operations conducted on and after June 7, 1954, the date of the Supreme Court decision in the *Phillips Petroleum Company* case.

Although the decision of the Supreme Court is, of itself, notice to all "independent producers," as hereinafter defined, of their responsibilities and duties under the Natural Gas Act, the Commission recognizes that there may be areas of uncertainty and there may be a few situations where independent producers have, in good faith, endeavored to invoke a price increase provided in a sales contract executed prior to June 7, 1954, or in good faith taken other steps since said date without Commission approval which require the same.

Of course, any action which requires Commission approval under the law is not effective without it. The Commission will do all it can to assist in adjusting any such matters, without unnecessary punitive action, to the end that all independent producers will receive like treatment as of June 7, 1954, henceforth.

Wherefore, in accordance with the foregoing and pursuant to the authority vested in it by the Natural Gas Act (52 Stat. 821-833; 15 U.S.C. 717-717w) and particularly Sections 4, 7 and 16 thereof (52 Stat. 822, 824, 830; 15 U.S.C. 717c, 717f and 717w), and subject to the provisions of Sections 3 and 4 of the Administrative Procedure Act (60 Stat. 238; 5 U.S.C. 1002, 1003), the Commission *orders*:

(A) Part 154—Rate Schedules and Tariffs—of Subchapter E, Regulations under the Natural Gas Act, Chapter 1 of Title 18, Code of Federal Regulations, is amended by adding thereto the following new sections reading as follows:

§ 154.91 *"Independent Producer" Defined.*—An "independent producer" as that term is used in these Rules means any person as defined in the Natural Gas Act who is engaged in *the production* or gathering of natural gas *and* who transports natural gas in interstate commerce *or* sells natural gas in interstate commerce for resale, but who is not primarily engaged in the operation of an interstate pipeline.

§ 154.92 *Filing of Rate Schedules by Producer-Gatherer "Natural-gas Companies"*—(a) Every independent producer who, on or since June 7, 1954, has engaged in the interstate transportation or sale of natural gas subject to the jurisdiction of the Commission shall on or before October 1, 1954, file with the Commission rate schedules, as defined in Section 154.93 hereof, setting forth the terms and conditions of service and all rates and charges for such transportation or sale effective on June 7, 1954. To each such rate schedule there shall be attached a statement showing actual billing for a recent month in sufficient detail to show how the billing amount is determined.

(b) Every independent producer who, subsequent to the effective date of these rules, proposes to initiate an interstate transportation or sale of natural gas subject to the jurisdiction of the Commission to an existing or new customer shall file with the Commission not less than 30 days nor more than 60 days prior to the date such transportation or sale is proposed to be initiated a rate schedule, as defined in Section 154.93 hereof, setting forth the terms and conditions of service and all rates and charges for such transportation or sale. To each such rate schedule there shall be attached a statement showing estimated sales and billing for the first month of service, in sufficient detail to show billing determinants and prices used. The statement shall also give the proposed date of commencement of service. A complete copy of all material shall be furnished to each purchaser under the rate schedule. With each such filing there shall be submitted a list of purchasers, State commissions, municipalities or other public agencies to whom such material has been mailed.

§ 154.93 *Rate Schedule Defined*—For the purpose of Section 154.91 through 154.102 hereof "Rate Schelule" shall mean the basic contract and all supplements or agreements amendatory thereof, effective and applicable on and after June 7, 1954, showing the service to be provided and the rates and charges, terms, conditions, classifications, practices, rules and regulations affecting or relating to such rates or charges, applicable to the transportation of natural gas in interstate commerce or the sale of natural gas in interstate commerce for resale subject to the jurisdiction of the Commission.

§ 154.94 *Changes in Rate Schedules*—No change shall be made in any rate, charge, or service in effect on and after June 7, 1954, for the interstate transportation or sale of natural gas in interstate commerce subject to the jurisdiction of the Commission by any independent producer required to file rate schedules pursuant to Section 154.92 hereof, without first filing a change in rates pursuant to Section 4(d) of the Natural Gas Act and in accordance with this section.

Every change in any rate schedule, rate, charge, classification or service effective or applicable to a sale subject to the jurisdiction of the Commission as of June 7, 1954, and on file with the Commission, or required to be filed pursuant to Section 154.92, or in any rate schedule, rate, charge, classification or service effective or applicable to a sale subject to the jurisdiction of the Commission initiated subsequent to June 7, 1954, on file with the Commission, or required to be filed with the Commission pursuant to Section 154.92 shall be filed with the Commission not less than 30 days nor more than 60 days prior to the date such change in rate schedule is proposed to be made effective.

The operation of any provision of the rate schedule providing for future or periodic changes in the rate, charge, classification, or service after June 7, 1954, or the effective date of any rate schedule for initial service after June 7, 1954, shall constitute a change in rate schedule.

Any change in any rate schedule, rate, charge, classification, or service provided in a rate schedule in effect on June 7, 1954, which by the terms of said rate schedule is to be operative after June 7, 1954, but prior to September 15, 1954, may be filed within said period without thirty days' prior notice, which notice is hereby waived. If the Commission in any case shall find it necessary to suspend any such proposed change, the suspension period will begin with the designated effective date of such change.

With each change in rate schedule there shall be submitted reasons, nature and basis for the proposed change, and the following information and data: (i) the date on which such filing is proposed to be made effective; (ii) a comparative statement of sales made and revenues therefrom by months under the then effective rate schedule and under the proposed changed rate schedule, or rate, charge, classification or service contained therein for the 12 months immediately preceding and for the 12 months immediately succeeding the proposed effective date of the rate schedule tendered for filing. Actual data shall be used wherever possible and any estimates shall be so designated and explained. The statement shall be subdivided by customers and delivery points when more than one is involved. Such data shall show the effect of all billing determinants.

If the proposed change in a rate schedule will result in an increase in a rate or charge, there shall also be submitted a full statement in support of such increase. A complete copy of all material shall be furnished to each party to the rate schedule. With each such filing there shall be submitted a list of purchasers, State commissions, municipalities or other public agencies to whom such material has been mailed.

§ 154.95 *Oral Agreements*—If any rate schedule or change in a rate schedule is not in writing, its terms shall be reduced to writing and filed with the Commission.

§ 154.96 *Filing Date*—Filing date means the day on which a rate schedule, or a change in rate schedule, is received in the office of the Secretary of the Commission in compliance with the requirements of Sections 154.91 through 154.103 of these Regulations.

§ 154.97 *Cancellation or Termination*—When a rate schedule or part thereof is proposed to be cancelled or is to terminate by its own terms and no new rate schedule or part thereof is to be filed in its place, the filing company shall notify the Commission of the proposed cancellation or termination at least 30 days prior to the proposed effective date of such cancellation or termination. With such notice the company shall submit a statement showing the reasons for the cancellation or termination and a certification that such notice of cancellation or termination has been served on the affected party or parties, together with names of State commissions and interested parties to whom the notice has been mailed.

§ 154.98 *Waiver of Notice Requirements*—Upon application and for good cause shown, the Commission may by order provide that a rate schedule or a change in rate schedule shall be effective on less than 30 days' notice. The Commission upon request and for good cause shown may permit a rate schedule or a change in rate schedule to be filed prior to 60 days before the effective date.

§ 154.99 *Number of Copies*—Two copies of any rate schedule or part thereof, and material relating thereto, and Notices of Cancellation or Termination, submitted for filing must be supplied to the Commission. The Commission reserves the right to request additional copies. All copies are to be included in a single package, insofar as possible, together with a letter of transmittal and other material and information required by these rules, addressed to the Secretary of the Federal Power Commission, Washington 25, D. C.

Such letter ~~of~~ transmittal shall contain a complete list ~~of~~ all material being filed, properly designated so that each item is easily identifiable.

§ 154.100 *Rejection of Rate Schedules and Material Submitted for Filing*—The Commission reserves the right to reject any rate schedule or material submitted for filing which fails to comply with the requirements of Sections 154.91 through 154.103.

§ 154.101 *Acceptance for Filing not Approval*—Acceptance for filing of any rate schedule or part thereof, or of a Notice of Cancellation or Termination, is not to be construed as approval by the Commission, nor to serve in lieu of any requirements under Section 7 of the Natural Gas Act.

§ 154.102 *Posting*—Any company required to file rate schedules pursuant to Sections 154.91 through 154.103 shall make such rate schedules available to any party for inspection at the company's main offices during regular business hours.

§ 154.103 *Applicability of Sections 154.91 through 154.102*—Sections 154.91 through 154.102 hereof shall be applicable only to those persons specified in Section 154.91 hereof.

(B) Part 157—Applications for Certificates of Public Convenience and Necessity under Section 7 of the Natural Gas Act as amended—of Subchapter F, Regulations under the Natural Gas Act, Chapter I of Title 18, Code of Federal Regulations, be amended by adding thereto the following new sections reading as follows:

§ 157.23 *Applications for Certificate of Public Convenience and Necessity by Independent Producer*—(a) Every independent producer of natural gas who, on or since June 7, 1954, has engaged in the interstate transportation or sale of natural gas subject to the jurisdiction of the Commission, and who has not heretofore obtained from the Commission a certificate of public convenience and necessity pursuant to Section 7 of the Natural Gas Act, as amended, shall, on or before October 1, 1954, file with the Commission an application in accordance with Sections 157.24 through 157.28. Independent producers whose sales of natural gas subject to the jurisdiction of the Commission amount to less than 1,000,000 Mcf annually, may, in lieu of the foregoing, file by October 1, 1954, the information called for by the attached Exhibit A. Pending action by the Commission on an application hereunder, the service for which authorization is sought shall be continued.

(b) No independent producer of natural gas shall, subsequent to the issuance of these rules, engage in any new service with respect to the transportation of natural gas in interstate commerce or sale of such natural gas for resale in interstate commerce subject to the jurisdiction of the Commission without approval of the Commission, evidenced by a certificate of public convenience and necessity authorizing such transportation or sale, first had and obtained pursuant to this Section; Provided, however, that independent producers whose sales of natural gas subject to the jurisdiction of the Commission amount to less than 1,000,000 Mcf annually may, in lieu of the foregoing, file by October 1, 1954, the information called for by the attached Exhibit A. In instances where a certificate of public convenience and necessity is required of a natural-gas company to enable it to receive or purchase natural gas from another natural gas company, the applications for certificates of public convenience and necessity shall be filed simultaneously.

§ 157.24 *Contents of Application.* (a) Every application for a certificate of public convenience and necessity required under § 157.23 hereof, for continued operation based on bona fide operations on June 7, 1954, shall be filed with the Commission on or before October 1, 1954, and shall set forth in the order indicated the following:

(1) The exact legal name of the applicant; if, the applicant is a corporation, the state or territory under the laws of which the applicant is organized, the location of applicant's principal place of business, and the names of all states where applicant is authorized to do business.

(2) The same data required by paragraph (a) of this section with respect to any predecessor in interest of the applicant bona fide engaged in the transportation or sale of natural gas subject to the jurisdiction of the Commission on June 7, 1954.

(3) The name, title, and post office address of the person to whom correspondence or communications in regard to the application is to be addressed. Unless advised to the contrary, the Commission will serve all notices, orders, and other papers, service of which is required, upon the person so named.

(4) A statement of pertinent facts showing that applicant or a predecessor in interest of applicant was a natural-gas company within the meaning of the Natural Gas Act and was bona fide engaged in transportation of natural gas in interstate commerce or

sale of natural gas in interstate commerce for resale on June 7, 1954, and that applicant is entitled to a certificate of public convenience and necessity under Section 7(c) of the Natural Gas Act as amended. Without limitation upon the requirements of this paragraph, such statement shall include a showing of:

(i) The sources of the gas (a) produced by applicant or predecessor and (b) purchased by applicant or predecessor. In case of gas produced, give the approximate location of the fields and the points of delivery, and in the case of gas purchased, the names of the sellers and points of delivery.

(ii) The route or routes of the pipe lines over which such transportation or sale of natural gas was accomplished.

(iii) The communities actually served on June 7, 1954, (a) at wholesale and (b) at retail.

(iv) The names of, and points of delivery to, main line industrial customers (i. e., not located within communities under (iii) above) purchasing 25,000 M.c.f. or more per year. Such main line industrial customers, purchasing 100,000 M.c.f. or more per year, shall be given the identifying designations I-1, I-2, etc., which designation shall be used in lieu of names on Exhibit B of the application.

(v) Major appurtenant properties and facilities, such as compressor stations, gasoline plants, dehydration plants, purification plants, and gas storage projects.

(b) Notice of the application shall be given by applicant by service of a true copy of the application (without the exhibits provided for in § 157.25) upon the state regulatory commission, agency, or official having authority to regulate the transportation or sale of gas in every state in which applicant operated on June 7, 1954, or upon the governor of the state when there is no such state regulatory commission, agency, or official, by delivery of said copy in person or by registered mail.

§ 157.25 *Necessary exhibits.* There shall be filed with the application as a part thereof the following exhibits. Any information required which is already on file with the Commission may be incorporated by reference. If applicant is unable to file any designated exhibit on or before October 1, 1954, a statement setting forth the reasons for such failure should be submitted in lieu of the appropriate lettered exhibit and a further extension of time for filing the exhibit, not to exceed 90 days, may be granted by the Commission. The following required exhibits are designed to amplify paragraphs (a) and (b) of § 157.24.

Exhibit A. If applicant is a corporation, a certified copy or photostat of its articles of incorporation and by-laws.

Exhibit A-1. If applicant is a corporation, certified copies or photostats of any and all evidences of domestication in or authorization to do business in any state or states other than the state of incorporation involved in the application.

Exhibit A-2. If applicant is an individual, or group of individuals, satisfactory proof of the citizenship of such individual or individuals.

Exhibit A-3. A certified copy or photostat of the resolution of the board of directors or other similar legal authority authorizing the filing of the application.

Exhibit B. A general key map of applicant's facilities in use on June 7, 1954, for the production, transportation, or sale of natural gas showing:

(a) The location of gas fields from which gas is produced by applicant or affiliated companies or at which gas is purchased by applicant.

(b) The location of applicant's pipe lines and the diameters thereof.

(c) The points of connection with the facilities or pipe line systems of other companies.

(d) The designation of points of delivery of gas to applicant's system.

(e) The communities served at wholesale and at retail, indicating those served at wholesale by a small square and those at retail by a small circle.

(f) The designation of points of delivery of gas from applicant's system, including points of delivery to main line industrial customers purchasing 100,000 M.c.f. or more per year. Such main line industrial customers are to be designated I-1, I-2, etc., as indicated in § 157.24(a) (iv):

The map should be of sufficient scale and in sufficient detail to show the geographical location of the properties. Applicant may be required to furnish the Commission with additional alignment or field maps in support of the application.

Every natural-gas company is hereby ordered and required to keep on hand in its offices subsidiary alignment and field maps properly marked and maintained showing all the facts required in connection with Exhibit B above with sufficient certainty to establish beyond doubt the extent and location of its said facilities in use on June 7, 1954, and to be prepared to furnish information relative thereto or copies thereof at any time to the Commission.

Exhibit C. The applicant may submit as many additional exhibits as may be deemed essential for consideration of the application. Such exhibits may be identified as Exhibit D, etc., or may be given subnumbers, such as Exhibit B-1, etc., as appropriate.

§ 157.26 *Form of filing.* An application under § 157.24 and § 157.25 shall be in compliance with § 1.15 and § 1.17 of this chapter, and in addition the original of the application (which shall include the originals of all exhibits accompanying said application) shall be verified under oath by a person having knowledge of the matters therein set forth.

§ 157.27 *Other information.* The applicant may be required to furnish such additional information as the Commission may deem pertinent.

§ 157.28 *Abandonment of Service*—No independent producer as defined in Section 154.91 of these Rules shall abandon any sale, transportation or service, subject to the jurisdiction of the Commission, being rendered on or since June 7, 1954, without the express permission and approval of the Commission first had and obtained in accordance with Section 7(b) of the Natural Gas Act.

§ 157.29 *Applicability of Sections 157.23 to 157.28*—Sections 157.23 through 157.28 hereof shall be applicable only to an independent producer as defined in Section 154.91 of these Rules.

(C) The rules and regulations herein prescribed be and they are hereby made effective immediately upon issuance hereof.

(D) Until the further order of the Commission, the rules and regulations requiring natural-gas companies to keep and maintain their accounts in accordance with the Commission's Uniform System of Accounts for Natural Gas Companies (18 CFR Chapter I, Subchapter F) and to submit reports thereon shall not apply to independent producers as defined in Section 154.91.

(E) The Secretary of the Commission shall cause publication of this order to be made in the Federal Register.

By the Commission. Commissioner Digby dissenting.

Leon M. Fuquay,
Secretary.

Adopted: July 15, 1954
Issued: July 16, 1954

EXHIBIT A.

Suggested Form for Applications for Certificates of Public Convenience and Necessity by Class B Independent Producers[1]

(1) Name of Applicant. ....

(2) State of Organization. ....

(3) Location of Principal Place of Business. ....

(4) Names of States in Which Authorized to do Business.

(5) Person Responsible for Application:

(a) Name and Title. ....

(b) Mailing Address. ....

(6) Description of Facilities Used for Operations for Which Certificate is Requested (where applicable).

(a) Pipelines.

(i) Location ....

(ii) Length and diameter. ....

(iii) Capacity (Mcf daily). ....

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[1] Independent producers defined in section 154.91 as transporting in interstate commerce or selling in interstate commerce for resale a total of less than 1,000,000 Mcf per year of natural gas.

(b) Compressor Stations.

(i) Location. ____________

(ii) Horsepower. ____________

(iii) Capacity (Mcf daily). ____________

(c) Gasoline Plants.

(i) Location. ____________

(ii) Capacity (Mcf daily). ____________

(d) Dehydration Plants.

(i) Location. ____________

(ii) Capacity (Mcf daily). ____________

(e) Purification Plants.

(i) Location. ____________

(ii) Capacity (daily). ____________

(f) Storage Projects.

(i) Location. ____________

(ii) Maximum volumes that can be stored Mcf. ____________

(7) Gas Supply.

(a) Own Production:

(i) Name and location of field. ____________

(ii) Acreage controlled. ____________

(iii) Estimated gas reserve in place. ____________

(b) Gas Purchased:

(i) Name of seller. ____________

(ii) Name and location of field. ____________

(iii) Estimated gas reserve in place.

(iv) Point of delivery to applicant.

(8) Gas Sales or Transportation Contracts (for each contract).[1]

(a) Name of purchaser.

(b) Point of delivery.

(c) Contract volumes Mcf (daily or annually), indicating pressure base.

(d) Price at time of filing.

(e) Date of contract.

(f) Term of contract.

(g) Special conditions (if any).

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[1] Contracts on file as rate schedules may be incorporated by reference.

APPENDIX E.

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Docket No. R-168

Nonacceptability of Rate Filings Based Upon State-Prescribed Minimum Prices

Notice of Proposed Rulemaking.

(April 28, 1958)

Notice is hereby given that the Commission has under consideration the issuance of a statement of general policy in the above-entitled matter.

On January 20, 1958, the Supreme Court, in *Cities Service Gas Co. v. State Corporation Commission of Kansas*, 355 U.S. 391 (citing *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, and *Natural Gas Pipeline Co. v. Panoma*, 349 U.S. 44), vacated a judgment of the Supreme Court of Kansas thereby holding, in effect, that the State of Kansas cannot lawfully fix a minimum price at the wellhead to be charged for, or attributed to, natural gas where such gas is sold in interstate commerce for resale, either at the wellhead or after production and gathering. A week later the Court, citing the *Cities Service* case, reversed the Oklahoma Supreme Court which had erroneously applied the holding in the *Panoma* case, *supra*, to sales of residue gas only and not to sales at or near the wellhead. *Michigan Wisconsin Pipe Line Co. v. Corporation Commission of Oklahoma*, 355 U.S. 425.

It follows from the decisions in these cases that rate filings made pursuant to Section 4 of the Natural Gas Act and Part 154 of the Regulations under the Natural Gas Act may have no legal basis to the extent that such filings are predicated solely on State-prescribed prices of the nature described above.

Although, under Section 4 (a) of the Administrative Procedure Act, no general notice of proposed rulemaking is required where a statement of general policy is proposed to be issued, the Commission is cognizant of the importance of the decisions of the Supreme Court and any statement that it might issue in this regard. It, therefore, is taking this method of informing the public and interested parties that it is proposing to issue a statement substantially as follows as an amendment of its general rules, Part 2—General Policy and Interpretations, and possibly other statements or take other actions:

> § 2.56. *State-prescribed minimum prices for natural gas.* Since the Supreme Court has held, in effect, that States cannot lawfully fix a minimum price at the wellhead to be charged for, or attributed to, natural gas where such gas is sold in interstate commerce for resale, the Commission will reject any tender for filing pursuant to Section 4 of the Natural Gas Act which would initiate or change the price for the sale of natural gas in interstate commerce for resale to the extent that such filing is based upon a State-prescribed or attributed minimum price. (E.g., Gas Price-Fixing Order of State Corporation Commission of Kansas, entered December 2, 1953 or the corresponding order of the Corporation Commission of Oklahoma.)

Among those questions which the Commission is considering in this connection which appear to be raised by the decisions of the Supreme Court referred to, are:

1. whether any rate filing predicated solely upon a State minimum price order which has been declared invalid by the United States Supreme Court—

a. must now be regarded as having been invalid from the date of filing; or

b. must now be regarded as having become invalid upon the issuance on January 20, 1958 of the decision of the Supreme Court in *Cities Service Gas Co. v. State Corporation of Commission of Kansas*, 355 U.S. 391, or on March 12, 1958, when the mandate of the Supreme Court was issued in that case; or

c. must now be regarded as having become invalid on the happening of some other event: or

d. must be regarded as still effective;

i. by reason of failure of the purchaser thereunder to protest the filing; or

ii. by reason of an agreement, expressed or implied, to pay the filed rate;

iii. by reason of legal estoppel against a protest by a purchaser thereunder; or

iv. for any other reason.

2. whether any of the above questions should be decided by the Commission by means of a general order or decided in individual cases after appropriate proceedings, including hearings; or should be left for decision by an appropriate court in each individual situation;

3. in the absence of reparation power under the Natural Gas Act, whether the Commission can force any purchaser receiving refunds under an invalid rate as herein mentioned to pass such refunds on to its customers, and if not, whether the ultimate consumers

would benefit from any refunds retained by the purchaser to whom paid by a producer hereunder.

The statement of general policy and the order herein described are proposed to be issued under the authority granted to the Federal Power Commission by Sections 4 and 16 of the Natural Gas Act (52 Stat. 822, 830; 15 U.S.C. 717c, 717o).

Any person may submit to the Federal Power Commission, Washington 25, D. C., not later than May 27, 1958, data, views, comments, and suggestions in writing concerning the proposed statement and order. An original and nine copies of any such submittal should be filed. The Commission will consider any such written submittals before acting on the proposed statement and order.

/s/ J. H. Gutride,
Joseph H. Gutride,
Secretary.

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1959

No. 302

State Corporation Commission of Kansas,
Petitioner,
versus
Cities Service Gas Company, a Corporation,
Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of Kansas

BRIEF OF CITIES SERVICE GAS COMPANY IN OPPOSITION

Conrad C. Mount,
Joe Rolston,
Gordon J. Quilter,
Robert R. McCracken,
Charles V. Wheeler,
First National Building,
Oklahoma City 1, Oklahoma;
MARK H. ADAMS
~~Adams, Jones, Robinson & Manka~~,
Board of Trade Building,
Wichita 2, Kansas;
CLAYTON KLINE
~~Doran, Kline, Cosgrove & Russell~~,
First National Bank Building,
Topeka, Kansas,

Attorneys for Respondent,
Cities Service Gas Company.

September, 1959.

Utterback Typesetting Co., 13 So. Walker, Oklahoma City, Ph. CE 5-8750

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In the

Supreme Court of the United States

OCTOBER TERM, 1959

No. ....

STATE CORPORATION COMMISSION OF KANSAS,
Petitioner,

VERSUS

CITIES SERVICE GAS COMPANY, a Corporation
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Kansas

BRIEF OF CITIES SERVICE GAS COMPANY IN OPPOSITION

OPINIONS BELOW

The judgment of the District Court of Finney County, Kansas (R, 19-21) was entered without opinion. The opinion of the Supreme Court of Kansas (R. 159-166) is reported in 184 Kan. 540,[1] 337 P.2d 640.

JURISDICTION

The judgment of the Supreme Court of Kansas was entered on April 11, 1959 (R. 159). Within the time prescribed by Order of the Supreme Court of Kansas (R. 180) the State Corporation Commission of Kansas[2] on May 15, 1959, filed its Motion for Rehearing (R. 181-198) which, on May 20, 1959, was denied (R. 199). Petitioner invokes the jurisdiction of this Court under 28 U.S.C. 1257(3), 62 Stat. 929, on the ground that the validity of a state administrative order is drawn in question on grounds of repugnancy to a law of the United States.

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[1] April 1959 Advance Sheets; Part 3.

QUESTIONS PRESENTED

(1) Should this Court reverse the settled law announced by it holding that enactment of the Natural Gas Act preempted the field to the exclusion of state regulation of prices for gas sold for resale in interstate commerce?

(2) May petitioner now contend that the Kansas Minimum Price Order was valid until July 16, 1954, the date on which the Federal Power Commission promulgated its Order 174, when that question could have been but was not raised by petitioner on the first appeal herein?

STATUTES INVOLVED

The Federal Statute involved is the Natural Gas Act, 15 U.S.C. 717, *et seq.*, particularly Sections 1(b), 2(6), 4(a)—set out in Appendix A, *infra*, p. 1, and Order No. 174 (19 Fed. Reg. 4534) promulgated thereunder by the Federal Power Commission on July 16, 1954—set out in Petitioner's Appendix D, pp. A 36 to A 52. The state administrative order involved is the Order of the State Corporation Commission of Kansas entered on December 2, 1953, effective on and after January 1, 1954—set out in Petitioner's Appendix B, pp. A 18 to A 34.

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[2] Herein called "Petitioner."

STATEMENT

1. Background

This is the second appeal to this Court of *Cities Service Gas Company* v. *State Corporation Commission of Kansas* (355 U.S. 391, rehearing denied 355 U.S. 967). In the face of the existing Natural Gas Act (approved June 21, 1938) giving the Federal Power Commission exclusive jurisdiction over the price to be paid for gas sold for resale in interstate commerce, the State Corporation Commission of Kansas, on December 2, 1953, entered an Order, effective on and after January 1, 1954, prescribing a minimum price of 11 cents per Mcf for all gas taken from the Kansas Hugoton Field. The payment of the 11-cent ordered price was made a condition precedent to the withdrawal of gas. Cities Service Gas Company,[3] a natural gas company under the Natural Gas Act, was and is engaged in the business of purchasing substantial quantities of gas produced in that field and transporting and selling such gas in interstate commerce at wholesale for resale and directly to industrial consumers in Oklahoma, Kansas, Missouri, and Nebraska. Cities' prior appeal reached this Court after the District Court of Finney County, Kansas, and the Supreme Court of Kansas (180 Kan. 454, 304 P.2d 528) had each rejected Cities' claim that the 11-cent Minimum Gas Price Order was invalid because it sought to fix a price for gas sold for resale in interstate commerce in conflict with Section 1(b) of the Natural Gas Act. This Court, by a *per curiam* opinion, reversed the judgment of the Kansas Supreme Court on January 20, 1958 (355 U.S. 391), rehearing denied March 3, 1958 (355 U.S. 967).

---

[3] Herein called "Cities."

2. Proceedings in the Kansas Supreme Court

Following the issuance by this Court of its mandate (R. 8-10) on March 12, 1958, to the Kansas Supreme Court, petitioner on March 14, 1958, moved (R. 2-5) the Kansas Supreme Court for an order directing the District Court of Finney County, Kansas, to reverse its judgment and vacate and set aside the 11-cent Minimum Gas Price Order from and after July 16, 1954. On March 19, 1958, Cities moved (R. 5) that Court for an Order denying petitioner's motion on the ground that that Court had no jurisdiction to modify, amend or limit the mandate of this Court. On March 31, 1958, Cities moved (R. 6-7) the Court for an Order reversing its decision rendered on December 8, 1956 (180 Kan. 454, 304 P.2d 528), and to issue a mandate to the District Court of Finney County, Kansas, ordering and directing the District Court to set aside and hold for naught the 11-cent Minimum Gas Price Order "as of its effective date and time, *i.e.*, 12:01 A.M. on January 1, 1954." On April 9, 1958, the Kansas Supreme Court entered its Order (R. 7-10) spreading of record the mandate of this Court; reversing its Opinion of December 8, 1956 (180 Kan. 454, 304 P.2d 528); vacating and setting aside the judgment of the District Court of Finney County, Kansas, upholding the

11-cent Minimum Gas Price Order; directing certified copies of the mandate of this Court to be delivered to the District Court; and instructing the District Court to vacate and set aside its previous judgment "and for further proceedings not inconsistent with the mandate of the Supreme Court of the United States and its *per curiam* opinion."

3. Proceedings in the District Court of Finney County, Kansas

On April 17, 1958, petitioner moved (R. 10-18) the District Court of Finney County, Kansas, for an order in conformity with the decision and mandate of this Court, and the Order of the Kansas Supreme Court dated April 14, 1958, and to enter a new judgment vacating and setting aside the 11-cent Minimum Gas Price Order "from and after July 16, 1954." Cities, on April 25, 1958, moved (R. 18-19) the District Court for an order, in compliance with the opinion and mandate of this Court, and the Order of the Kansas Supreme Court, reversing the judgment of the District Court dated May 14, 1956, and setting aside the 11-cent Minimum Gas Price Order "for lack of jurisdiction by the said Commission to enter the said Order." On May 12, 1958, the District Court found that: (1) in compliance with the Kansas Supreme Court's mandate and the mandate of this Court and its *per curiam* opinion, the previous judgment of the District Court dated May 14, 1956 "be and the same should be vacated and set aside"; and (2) that petitioner "was without jurisdiction to enter" the 11-cent Minimum Gas Price Order, and such Order "should be by this court set aside." Thereupon, the District Court rendered judgment ordering that: (a) its previous judgment of May 14, 1956 "be and the same is hereby vacated and set aside"; and (b) the 11-cent Minimum Gas Price Order "be and the same is hereby set aside."

4. Proceedings in the Kansas Supreme Court on Appeal

Being unsuccessful before the District Court in sustaining its contention, petitioner, on June 10, 1958, appealed the adverse ruling of the District Court to the Kansas Supreme Court (R. 21-22) on the ground that the 11-cent Minimum Gas Price Order was valid from its effective date, January 1, 1954, until July 16, 1954, when Federal Power Commission issued its Order No. 174. Petitioner appealed, notwithstanding it was aware that the force and effect of the opinion of this Court in *Cities Service Gas Company v. Corporation Commission, supra,* was that the 11-cent Minimum Gas Price Order was void *ab initio* because a state cannot fix the price of gas purchased by a company which transports the gas for resale in interstate commerce, but that such sales are exclusively controlled by the Natural Gas Act. On April 11, 1959, the Kansas Supreme Court, by a six to one decision, affirmed the judgment of the District Court (R. 159-175). Rehearing was denied May 20, 1959. That opinion is reported in 184 Kan. 540 and 337 P.2d 640. The syllabus written by the Court, which by Kansas Statute (60-3329, G.S. 1949) constitutes the points of law decided, reads:

> "In an appeal from the order of the district court construing the mandate of the Supreme Court of the United States, which mandate reversed the de-

> cision heretofore entered by this court in this case, it is now held that the reversal of said decision must be understood to hold that the order of the State Corporation Commission dated January 1, 1954, and fixing a minimum price for natural gas at the wellhead invaded the jurisdiction of the Federal Power Commission and was not within the jurisdiction of the State Corporation Commission to enter even though the Federal Power Commission had not exercised jurisdiction in the matter."

That syllabus is the judgment petitioner seeks to have reviewed herein.

ARGUMENT

It is settled law that the Kansas Minimum Price Order was void ab initio.

Petitioner contends, in substance, that enactment of the Natural Gas Act did not so preempt the field as to render the Kansas Minimum Price Order void *ab initio*. On the contrary, petitioner argues, said Order was valid until July 16, 1954, when the Federal Power Commission occupied the field by promulgation of its Order 174.

As will appear in more detail below, by such contention petitioner simply asks this Court to reverse the settled law announced in the case at bar and in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954), and *Natural Gas Pipeline Co. of America* v. *Panoma Corp.*, 349 U.S. 44 (1955). Moreover, this Court has three times denied certiorari within the last fifteen months in cases urging the precise argument advanced by petitioner in the case at bar. Additionally, three United States Courts of

Appeal and two State Supreme Courts have consistently decided the question contrary to petitioner's contention herein and in harmony with the law announced in the *Cities Service, Phillips* and *Panoma* cases, *supra*. Thus petitioner seeks, in effect, to have those decisions set aside.

Cities respectfully submits that petitioner's Petition for Certiorari herein should be denied. It is abundantly clear that in the case at bar this Court plainly ruled that the Kansas Minimum Price Order was void *ab initio*. While the *per curiam* opinion therein merely states that the judgment of the Kansas Supreme Court is reversed, the opinion cites as authority therefor, *Phillips Petroleum Co.* v. *Wisconsin, supra*, and *Natural Gas Pipeline Co. of America* v. *Panoma Corp., supra*. The *Phillips* case squarely held that sales of gas by independent gas producers to interstate pipeline companies were within the scope of the Natural Gas Act. There was no question as to Federal Power Commission exercise of jurisdiction. Indeed, the Commission had until then regarded itself without jurisdiction. The *Phillips* case had its inception in a disclaimer of jurisdiction by the Commission. This Court's reliance upon the *Phillips* case in these instances shows that the Court held the Kansas Order invalid because the Congressional enactment of the Natural Gas Act had fully preempted the field and left no area for state action.

The citation of the *Panoma* case makes this preemption even more clear. There, this Court had also held invalid the Oklahoma Minimum Gas Price Order on the authority of the *Phillips* case. There this Court said:

> "We held in" — *Phillips* — "that such a sale and transportation cannot be regulated by a state but are subject to the *exclusive*[4] regulation of the Federal Power Commission. The *Phillips* case, therefore, controls this one."

The *per curiam* opinion also noted:

> "Mr. Justice Douglas, being of the opinion that state regulation is permissible until Federal price regulation permitted by *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 98 L.Ed. 1035, 74 S. Ct. 794, is imposed, dissents."

That dissent by Mr. Justice Douglas makes it clear that this Court considered and rejected petitioner's contention here urged and concluded that, since the Natural Gas Act had fully preempted the field and left no area for state action, the Oklahoma Minimum Gas Price Order was invalid from its inception.

The absence of a dissent by Mr. Justice Douglas in *Cities Service Gas Company* v. *Corporation Commission* (*supra*) is significant, for such absence establishes that this Court considered it settled law that the Natural Gas Act had fully preempted the field, leaving no area for state action, and that the Kansas 11-cent Minimum Gas Price Order was invalid from its inception.

Under these circumstances, the citation by this Court of the *Phillips* and *Panoma* cases in the *Cities Service* case can only mean that this Court again determined the Natural Gas Act had fully preempted the field and left no area for state action and, as a consequence, the 11-cent Minimum Gas Price Order was also void *ab initio.*

---

[4] Emphasis ours throughout this brief.

In confirmation of its holding in the *Cities Service* case, this Court in *Michigan-Wisconsin Pipeline Co.* v. *Corporation Commission of Oklahoma,* 355 U.S. 425 (Second appeal in the *Panoma* case, *supra*) significantly cited only the *Cities Service* case as authority for reversal of the Oklahoma Supreme Court's judgments which had upheld the Oklahoma Minimum Gas Price Order.

Three United States Circuit Courts of Appeal have consistently followed the determination of this Court. In a second petition for rehearing in *Natural Gas Pipeline Co. of America* v. *Harrington,* 246 F.2d 915, Harrington contended:

> "This petition is confined to a discussion of whether the Oklahoma minimum price laws (Order No. 19514, issued December 9, 1946, and Order No. 26096, issued July 29, 1952) were invalid during the period prior to regulation of rates of independent producers by the Federal Power Commission."

The Court of Appeals for the Fifth Circuit, in its *per curiam* opinion, 253 F.2d 231 (1958), said:

> "Leave to file a second petition for rehearing is denied. *Natural Gas Co. of America* v. *Panoma Corp.,* 349 U.S. 44, 75 S. Ct. 576, 99 L. Ed. 683. The notation of Mr. Justice Douglas' dissent shows that the Court considered the question presented by this second petition for rehearing. See also the recent *per curiam* opinions of the Supreme Court in *Cities Service Gas Company* v. *State Corporation Commission of Kansas* * * * ."

The Court of Appeals for the Third Circuit reached the same conclusion in *Natural Gas Pipeline Co. of America v. Federal Power Commission*, 253 F.2d 3 (1958), where Dorchester Corporation, an intervener, filed its petition for rehearing, contending:

> "This court evidently assumes that the Oklahoma minimum price order was void *ab initio*. The Supreme Court, however, did not say *when* the Oklahoma minimum price order became invalid. This point was not decided by the Supreme Court in *Natural Gas Pipeline Company of America v. Penoma Corporation*. In *Panoma*, the Court made no determination as to whether such state regulation was valid or invalid *prior to the implementation of regulation of the independent producers by the Federal Power Commission* which did not occur until the promulgation by the Commission of Order No. 174 on July 16, 1954" (Dorchester supplied emphasis).

The Court denied that petition for rehearing.

The Court of Appeals for the Tenth Circuit likewise followed the consistent determination of this Court and the Courts of Appeals for the Third and Fifth Circuits in an action involving the same Kansas 11-cent Minimum Gas Price Order here involved, when in *Cities Service Gas Company v. Federal Power Commission*, 255 F.2d 860 (1958). Magnolia Petroleum Company, an intervener, filed a petition for rehearing presenting the same question here presented. There Magnolia contended that the Court of Appeals for the Tenth Circuit had erred:

> "(4) In finding, concluding and holding that the Kansas order was not valid on June 7, 1954.

"(5) In failing to find that the Kansas order remained valid until the first exercise of supervening federal jurisdiction over Magnolia Petroleum Company by the issuance of Order 174 on July 16, 1954."

Rehearing was denied.

Significantly, a petition for writ of certiorari was denied by this Court in each of those three Courts of Appeal cases.

Harrington—Petition No. 901—May 19, 1958, (October Term 1957), 356 U.S. 957;

Dorchester—Petition No. 1003—June 23, 1958, (October Term 1957), 357 U.S. 927;

Magnolia —Petition No. 279—October 13, 1958, (October Term 1958), 358 U.S. 837.

Consistent and in complete harmony with the holdings of this Court and the three United States Courts of Appeal, the Oklahoma Supreme Court and the Kansas Supreme Court, the only State Supreme Courts which have passed upon the question here presented, have held the respective minimum gas price orders of their respective State Corporation Commission void *ab initio* because the Natural Gas Act had fully preempted the field.

When the mandate of the Supreme Court of the United States in the *Michigan-Wisconsin* case, *supra*, reached the Oklahoma Supreme Court, the latter court issued its mandate to the Oklahoma Corporation Commission on March 20, 1958, the pertinent part of which reads:

> "Now, Therefore, in conformity with the mandate and order of the Supreme Court of the United States, it is ordered as follows:.
>
> "1. That Order No. 26096 of the Corporation Commission of the State of Oklahoma, which is the subject of the appeals to this Court and the Supreme Court of the United States, be, and the same *is hereby reversed, set aside and held for naught in its entirety.*"

Finally, the Supreme Court of Kansas squarely and decisively rejected the contentions here made by petitioner when on April 11, 1959, rehearing denied May 20, 1959, that Court, in the case at bar, held:

> "In an appeal from the order of the District Court construing the mandate of the Supreme Court of the United States, which mandate reversed the decision heretofore ordered by this Court in this case, it is now held that the reversal of said decision must be understood to hold that the order of the State Corporation Commission dated January 1, 1954 and fixing a minimum price for natural gas at the wellhead invaded the jurisdiction of the Federal Power Commission and was not within the jurisdiction of the State Corporation Commission to enter, even though the Federal Power Commission had not exercised jurisdiction in the matter."

It is thus apparent that rather than being presented for the first time in the case at bar, as petitioner contends, this question has been decided on twelve occasions and each time contrary to petitioner's contentions. No conflict or deviation exists in the opinions of this Court, the three United States Courts of Appeal or of the two State Supreme Courts. All are uniformly consistent. Petitioner has shown no reason why this Court should, at this late date, reconsider the settled law announced in the cases hereinabove cited. Those cases established beyond any doubt that the Natural Gas Act preempted the entire field, leaving no area for state action, and the state minimum gas price orders accordingly were void *ab initio.*

Petitioner may not contend for the first time on a second appeal herein that the Kansas Minimum Price Order was valid to July 16, 1954.

Petitioner first asserts that the question here presented by it is involved in extensive litigation in State and Federal Courts and proceedings before the Federal Power Commission. Petitioner urges that great confusion exists in the minds of those courts and the Federal Power Commission and urges, therefore, that a definitive decision by this Court is required for the guidance of the State and Federal Courts, as well as the Federal Power Commission.

This is pure illusion. Petitioner points to no reason why the courts in which such litigation is pending will have any difficulty whatever in following the law repeatedly announced by this Court and uniformly followed by the three United States Courts of Appeal and the two State Supreme Courts. On the contrary, every reason exists to expect and require such courts to follow the law as settled and consistently applied by this Court. The mere fact that the defendants in such litigation may have raised the question here argued by petitioner in their answers in pending litigation does not mean that the courts befor whom such litigation is pending will have any difficulty in applying the settled law thereto.

Any concern petitioner may have that the question here presented is of primary concern in present or future proceedings before the Federal Power Commission has been laid to rest by that Commission itself. In *Cities Service Gas Co. v. Federal Power Commission*, 255 F.2d 860, p. 862, the Court of Appeals for the Tenth Circuit had this to say of the Commission's position:

> "The respondent Commission answers that the acceptance of a rate schedule for filing is not a determination by the Commission as to the validity or reasonableness of the rate and that the order complained of was merely procedural and interlocutory and not subject to review; *the Commission concedes that petitioner should recover, in a proper action, any excess payments but contends that the Kansas order is and always has been but a nullity in the filing and cannot be the basis for any relief to petitioner.*"

It is thus apparent that neither the courts in which such litigation is pending nor the Federal Power Commission needs or requires further guidance on the question here presented.

Finally, petitioner urges at length that the question here presented by it has never been presented to or passed upon by this Court. As Cities has demonstrated above, this Court, three United States Courts of Appeal and the two State Supreme Courts basically and necessarily determined the issue contrary to petitioner's contention, for preemption of the entire field by the Natural Gas Act left the states totally devoid of jurisdiction over regulation of gas prices.

Additionally, petitioner could have, but did not, raise the question here presented by it either in the original appeal or in its petition for rehearing. It is fundamental law, repeatedly expressed by this Court from its very inception, that questions which might have been but were not raised on a prior appeal will not be considered on a subsequent appeal. As so aptly observed by this Court in *Illinois ex rel Hunt* v. *Illinois Central Railroad Co.*, 184 U.S. 78, at page 92:

> "To allow a second writ of error on appeal to a court of last resort on the same questions which were open to dispute on the first would lead to endless litigation. In chancery a bill of review is sometimes allowed on a petition to the court; but there would be no end to a suit if every obstinate litigant could by repeated appeals compel the court to listen to criticisms on their opinions or speculate on chances from changes in its members."

The rule announced in the *Illinois* case, *supra*, merely reaffirms the rule of law set forth in a host of cases decided by this Court and cited in the footnote at 184 U.S. 92.

Indeed, the Kansas Supreme Court called petitioner's attention to this rule of law when it said (184 Kan. 544):

> "Any question of the meaning of the order of that court should have been raised with that court by the parties to that appeal."

The reason for the foregoing rule of law is obvious. There must be an end to litigation. If points of law can be raised piecemeal by repeated appeals, stability in the law could never result and the confusion in the law which petitioner envisages would indeed result.

CONCLUSION

The question of the validity of the Kansas Minimum Price Order has been in litigation since 1954, shortly after the promulgation of that Order. Thus, it is evident that an end should be put to further litigation on this subject. Petitioner respectfully submits that the settled law announced in the case at bar and in the *Phillips* and *Panoma* cases should put an end to such litigation and that certiorari should accordingly be denied.

Respectfully submitted,

CONRAD C. MOUNT,
JOE ROLSTON,
GORDON J. QUILTER,
ROBERT R. MCCRACKEN,
CHARLES V. WHEELER,
First National Building,
Oklahoma City 1, Oklahoma;
MARK H ADAMS
~~ADAMS, JONES, ROBINSON & MANKA~~,
Board of Trade Building,
Wichita 2, Kansas;
CLAYTON KLINE
~~DORAN, KLINE, COSGROVE & RUSSELL~~,
First National Bank Building,
Topeka, Kansas,

Attorneys for Respondent,
Cities Service Gas Company.

September, 1959.

APPENDIX

APPENDIX A

PERTINENT SECTIONS OF THE NATURAL GAS ACT

Section 1(b) The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas. June 21, 1938, c. 556, § 1, 52 Stat. 821.

Section 2(6) "Natural-gas company" means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.

Section 4(a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

[APPENDIX]

APPENDIX B

Mandate and Order of Oklahoma Supreme Court.

STATE OF OKLAHOMA) Duplicate of Mandate Issued
) SS.
SUPREME COURT . .) Corporation Commission 3628

Michigan-Wisconsin Pipe Line Company)
Plaintiff in Error.)
vs.) No. 35732
The Corporation Commission of the)
State of Oklahoma, et al.)
Defendant in Error.)

THE SUPREME COURT OF OKLAHOMA:

To the Honorable Judge of the Corporation Commission of State of Oklahoma, in said State of Oklahoma.

Whereas, the Supreme Court of the State of Oklahoma, did on the 20 day of March, 1958 render an opinion in the above entitled cause, appealed from the Corporation Commission of Oklahoma in conformity with the Mandate of the Supreme Court of the United States. Now, Therefore, you are hereby commanded to cause such conformity to the Mandate of the Supreme Court of United States to show of record in your court and to issue such process and take such other and further action as may be in accord with right and justice and said opinion.

Witness, the Honorable Earl Welch, Chief Justice of the Supreme Court of the State of Oklahoma, at the City of Oklahoma City, this 20 day of March, 1958.

(SEAL)

ANDY PAYNE, Clerk
By Ethel C. Hammett
Deputy

I, Andy Payne, Clerk of the Supreme Court of the State of Oklahoma do hereby certify that the above and foregoing is a full, true and complete copy of the Mandate Issued in the above entitled cause, as the same remains on file in my office.

In Witness Whereof I hereunto set my hand and affix the Seal of said Court, at Oklahoma City, this 26 day of May, 1959.

ANDY PAYNE, Clerk
(SEAL) By Ethel C. Hammett
Deputy

CCH: ET (9)3-10-58

FILED
IN SUPREME COURT
OF OKLAHOMA
Mar 20, 1959
Andy Payne, Clerk.

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

Michigan-Wisconsin Pipe Line Company,
Plaintiff in Error
vs No. 35732
The Corporation Commission of the
State of Oklahoma, et al.,
Defendants in Error.

ORDER

Now on this 20th day of March, 1958, it appearing that on the 27th day of January, 1958, the Supreme Court of the United States reversed the judgment and order of this Court entered herein on the 8th day of October, 1956, and that the mandate and order of that Court have been received and filed in the office of the Clerk of this court:

NOW, THEREFORE, in conformity with the mandate and order of the Supreme Court of the United States, it is ordered as follows:

1. That Order No. 26096 of the Corporation Commission of the State of Oklahoma, which is the subject of the appeals to this Court and the Supreme Court of the United States, be and the same is hereby reversed, set aside and held for naught in its entirety.

2. That a copy of this order and a copy of the mandate and order of the Supreme Court of the United States heretofore received and filed in this cause, together with proper mandate of this Court be forthwith transmitted to The Corporation Commission of the State of Oklahoma.

3. That Phillips Petroleum Company recover its costs incurred in the Supreme Court of the United States as set forth in the mandate of that Court in the amount of $100.00.

EARL WELCH,
Chief Justice.

I, Andy Payne, Clerk of the Supreme Court of the State of Oklahoma do hereby certify that the above and foregoing is a full, true and complete copy of the order of said Court in the above matter, as the same remains on file in my office.

In Witness Whereof I hereunto set my hand and affix the Seal of said Court, at Oklahoma City, this the 20 day of March, 1958.

ANDY PAYNE, Clerk
(SEAL) By Ethel C. Hammett
Deputy

Note:—Copy of Mandate and Order of United States Supreme Court omitted.

COPY

IN THE

Supreme Court of the United States

October Term, 1959

No. 302

STATE CORPORATION COMMISSION OF KANSAS, HARRY G. WILES, CHAIRMAN, MARION BEATTY AND RICHARD C. BYRD, AS MEMBERS OF SAID COMMISSION, AND THEIR RESPECTIVE SUCCESSORS IN OFFICE, *Petitioners*,

v.

CITIES SERVICE GAS COMPANY, a Corporation, *Respondent*

On Petition for a Writ of Certiorari to the Supreme Court of Kansas

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITION

JOHN ANDERSON, JR.,
State Capitol Building
Topeka, Kansas
Attorney General,
State of Kansas

BRUCE BENNETT,
Attorney General,
State of Arkansas

GRENVILLE BEARDSLEY,
Attorney General,
State of Illinois

JACK P. F. GREMILLION,
Attorney General,
State of Louisiana

CLARENCE S. BECK,
Attorney General,
State of Nebraska

HILTON A. DICKSON, JR.,
Attorney General,
State of New Mexico

MAC Q. WILLIAMSON,
Attorney General,
State of Oklahoma

WILL WILSON,
Attorney General,
State of Texas

THOMAS O. MILLER,
Attorney General,
State of Wyoming

WADE CHURCH,
Attorney General,
State of Arizona

DUKE W. DUNBAR,
Attorney General,
State of Colorado

JO M. FERGUSON,
Attorney General,
State of Kentucky

PAUL L. ADAMS,
Attorney General,
State of Michigan

ROGER FOLEY,
Attorney General,
State of Nevada

LESLIE R. BURGUM,
Attorney General,
State of North Dakota

PARNELL J. DONOHUE,
Attorney General,
State of South Dakota

WALTER L. BUDGE,
Attorney General,
State of Utah

Press of Byron S. Adams, Washington, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 302

STATE CORPORATION COMMISSION OF KANSAS, HARRY G. WILES, CHAIRMAN, MARION BEATTY AND RICHARD C. BYRD, AS MEMBERS OF SAID COMMISSION, AND THEIR RESPECTIVE SUCCESSORS IN OFFICE, *Petitioners*,

v.

CITIES SERVICE GAS COMPANY, a Corporation, *Respondent*

On Petition for a Writ of Certiorari to the Supreme Court of Kansas

---

BRIEF OF AMICI CURIAE

John Anderson, Jr., Attorney General of the State of Kansas, Wade Church, Attorney General of the State of Arizona, Bruce Bennett, Attorney General of the State of Arkansas, Duke W. Dunbar, Attorney General of the State of Colorado, Grenville Beardsley, Attorney General of the State of Illinois, Jo M.

Ferguson, Attorney General of the State of Kentucky, Jack P. F. Gremillion, Attorney General of the State of Louisiana, Paul L. Adams, Attorney General of the State of Michigan, Clarence S. Beck, Attorney General of the State of Nebraska, Roger Foley, Attorney General of the State of Nevada, Hilton A. Dickson, Jr., Attorney General of the State of New Mexico, Leslie R. Burgum, Attorney General of the State of North Dakota, Mac Q. Williamson, Attorney General of the State of Oklahoma, Parnell J. Donohue, Attorney General of the State of South Dakota, Will Wilson, Attorney General of the State of Texas, Walter L. Budge, Attorney General of the State of Utah and Thomas O. Miller, Attorney General of the State of Wyoming, as *amici curiae*, respectfully request that this Court grant the Petition of the Corporation Commission of the State of Kansas to review the judgment entered by the Supreme Court of that State in the above-entitled case on April 11, 1959, reported in 184 Kan. 540, 337 P. 2d 640.[1]

QUESTION PRESENTED

The question inherent in the petition for the writ and now before this Court directly involves the distribution of powers between the Federal and State governments. It is an aftermath of the one sentence *per curiam* opinion of this Court when the case was heretofore before the Court. The question, however, was not then an issue in the case; nor has it since been authoritatively decided. No reasoned opinion upon the subject has yet been written. A clear cut solution is now essential—to all States interested in a positive delineation of Federal-State powers in all instances in which the subject arises, to the many royalty-owners and gas producers in the Kansas-Hugoton Field, the largest gas reserve in this country, and to the Federal Power Commission itself, for guidance in its application of the provisions of the Natural Gas Act to the situation and conditions existing in that Field, and in other gas fields where State regulation may be, or may have been, superseded by Federal Power Commission regulation.

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[1] Reproduced in appendix A of Kansas Corporation Commission's Petition for Certiorari herein.

The undersigned Attorneys General, for the first reason, urge the granting of this writ and respectfully submit that the matter, in fact, may very properly be considered as "unfinished business" on the part of this Court in the case.

STATEMENT

On December 8, 1956, reported in 180 Kan. 454, 304 P. 2d 528, the Supreme Court of Kansas initially entered its judgment in the case.

The single issue then presented was *whether* an order of the State Corporation Commission of Kansas, effective January 1, 1954, prescribing a minimum well-head price of 11¢ per M.c.f. for gas produced in the Kansas-Hugoton Field was invalid as being in conflict with the price or rate regulatory authority of the Federal Power Commission under the provisions of the Natural Gas Act, 15 U.S.C.A., Sec. 717, *et seq.*

The Supreme Court of Kansas sustained the validity of the order. This Court, on January 20, 1958, reversed and stated as follows:[2]

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[2] *Cities Service Gas Company v. State Corporation Commission of Kansas, et al.*, 355 U.S. 391, 2 L. Ed. 2d 355 (1958).

"PER CURIAM: The judgment is reversed. *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 98 L.Ed. 1035, 74 S. Ct. 794; *Natural Gas Pipeline Co. v. Panoma Corporation*, 349 U.S. 44, 99 L.Ed. 866, 75 S. Ct. 576."

The one sentence *per curiam* opinion of the Court clearly renders invalid, actually inoperative, the Kansas 11c minimum price order as being in conflict with the price or rate regulatory authority of the Federal Power Commission under the provisions of the Natural Gas Act. Moreover, the *Phillips* case and the *Natural Gas Pipeline Company* case, cited as authority for the conclusion of the Court, are clear, direct and positive precedents to that effect. However, neither *Phillips*, *Natural Gas Pipeline Company*, nor any prior proceeding in this case in this Court reached the issue presented by the petition for this writ: namely, the exact "*point in time*" when the Kansas 11c minimum price order became invalid as being in conflict with the price or rate regulatory authority of the Federal Power Commission under the provisions of the Natural Gas Act.

Three dates are material to the question—June 21, 1938, the date of the enactment of the Natural Gas Act;[3] January 1, 1954, the effective date of the Kansas 11c minimum price order;[4] and July 16, 1954, the date of issuance of an order by the Federal Power Commission, designated as Order No. 174, the *first* instance of the exercise by that Commission of its regulatory authority, as recognized in the *Phillips* case, over independent producers of natural gas.[5]

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[3] 15 U.S.C.A. § 717, *et seq.*, 52 Stat. 821. Secs. 1(b), 2(6) and 4(a) of the Act are reproduced in Appendix A of the Brief of Cities Service Gas Company in opposition to the petition for certiorari herein.

[4] Reproduced in Appendix B of Kansas Corporation Commission's petition for certiorari herein.

The judgment of the Supreme Court of Kansas, herein sought to be reviewed, held that the Kansas 11¢ minimum price order was invalid *ab initio* on its effective date, January 1, 1954, and in a syllabus by the Court the following is stated:

> "In an appeal from the order of the district court construing the mandate of the Supreme Court of the United States, which mandate reversed the decision heretofore entered by this court in this case, it is now held that the reversal of said decision *must be understood* to hold that the order of the State Corporation Commission dated January 1, 1954, and fixing a minimum price for natural gas at the wellhead invaded the jurisdiction of the Federal Power Commission and was not within the jurisdiction of the State Corporation Commission to enter, *even though the Federal Power Commission had not exercised jurisdiction in the matter.*" (Emphasis added).

Stated differently, it is submitted that the Supreme Court of Kansas held that notwithstanding the fact that the issue of the exact "*point in time*" when the Kansas 11¢ minimum price order became invalid, or inoperative, as being in conflict with the price or rate regulatory authority of the Federal Power Commission under the provisions of the Natural Gas Act had not previously been briefed, argued, submitted to, or determined by this Court in its previous hearing of the case, and notwithstanding the further fact that not a line or word of this Court in its *per curiam* opinion or in its mandate bears upon the question, nevertheless, this Court's one sentence *per curiam* opinion "must be understood" to strike down a constitutionally valid State action[6] as of a date—January 1, 1954—which was prior even to the first entry—July 16, 1954—of a Federal agency in the same regulatory field.

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[5] 19 Fed. Reg. 4534; also reproduced in Appendix D of Kansas Corporation Commission's petition for certiorari herein. See the cases of *Sun Oil Company v. Federal Power Commission*, 256 F. 2d 233 (5th Cir. 1958) and *Magnolia Petroleum Company v. Federal Power Commission*, 236 F. 2d 785 (5th Cir. 1956), for a discussion of FPC Order No. 174 and the steps taken thereunder by the Commission in fashioning procedures for the extension of its regulatory activities to independent producers after its authority to that effect had been recognized and confirmed in the *Phillips* case.

The undersigned Attorneys General believe and respectfully submit that such is not the law; that this Court on numerous occasions has firmly established that mere Congressional delegation of regulatory power to a Federal agency in an area of concurrent State and Federal jurisdiction does not, of itself and in the absence of action by that agency, displace otherwise valid State regulation. This fundamental principle delineating and drawing a line of demarkation between State and Federal power was recognized as early as 1909 in *Missouri P.R. Co. v. Larabee Flour Mills Company*, 211 U.S. 612, and as late as March, 1959, in *Service Storage and Transfer Company, Inc. v. Commonwealth of Virginia*, —— U.S. ——, 79 S. Ct. 714, 3 L.Ed.2d 717.

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[6] *Cities Service Gas Co. v. Peerless Oil and Gas Co.*, 340 U.S. 179 (1950), sustained against constitutional attack a minimum price conservation measure similar in all substantial respects to the Kansas 11c minimum price order here involved; in fact, the order was one issued by the Oklahoma Corporation Commission for the Oklahoma portion of the same Hugoton Field. The Court stated: "It is now well settled that a state may regulate matters of local concern over which federal authority has not been exercised, even though the regulation has some impact on interstate commerce." *Supra* at 186. It will be noted that no Federal authority had been exercised on the effective date of the Kansas 11c minimum price order, January 1, 1954, and none was exercised until July 16, 1954, at which time it is conceded that paramount Federal authority superseded and rendered inoperative such otherwise valid State action.

The *Larabee* case concerned certain acts of Congress creating the Interstate Commerce Commission and granting to that Commission certain Federal powers in respect to interstate commerce. The question of "when" such acts foreclosed State power over the same subject matter was directly involved. In conflicting contentions it was urged, on the one side, that the mere grant of regulatory power to the Interstate Commerce Commission foreclosed exercise of the same power by the State, and, on the other, that notwithstanding such grant the State may continue to act until such time as the Commerce Commission affirmatively asserted its paramount jurisdiction. The opinion of this Court in the case states:

> "* * * In other words, the mere grant by Congress to the Commission of certain national powers in respect to interstate commerce does not of itself, and in the absence of action by the Commission, interfere with the authority of the State to make those regulations conducive to the welfare and convenience of its citizens. Running through the entire argument of counsel for the Missouri Pacific is the thought that the control of Congress over interstate commerce and a delegation of that control to a commission, necessarily withdraws from the state all power in respect to regulations of a local character. This proposition cannot be sustained."[7]

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[7] 211 U.S. at 623. Additional cases to the same effect are *Northwestern B. T. Co. v. Nebraska State R. Comm.*, 297 U.S. 471 (1936); *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945).

In *Service Storage and Transfer Company, Inc.*, this Court described and cited with approval, at 79 S. Ct. 719, its decision in *Welch Company* v. *New Hampshire*, 306 U.S. 79 (1939), as holding:

> ". . . that the enactment of the Motor Carrier Act did not, without more, supersede all reasonable state regulation, the latter continuing in effect until the Interstate Commerce Commission acted on the same subject matter."

Paraphrasing this most recent enunciation of this Court, it is the position of the undersigned Attorneys General that as a matter of Federal-State relationship "the mere enactment of the Natural Gas Act on June 21, 1938 did not, without more, supersede reasonable state conservation regulation, the latter continuing in effect until the Federal Power Commission acted on the same subject matter on July 16, 1954;"[8]

These principles of law on this subject are actually quite fundamental; however, it is not the purpose of the undersigned Attorneys General to go into all of the

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Terminal R. Asso. v. *Brotherhood of Trainmen*, 318 U.S. 1 (1943); *Eichholz* v. *Public Service Comm.*, 306 U.S. 268 (1939); and Mr. Justice Frankfurter's dissent in *Hill* v. *Florida*, 325 U.S. 538 (1945).

[8] That the enactment of the Natural Gas Act did not, without more, supersede all reasonable state conservation regulations, *i.e.*, that the area of natural gas regulation, like the areas of regulation under the Motor Carrier Act and the acts creating the Interstate Commerce Commission, is one of concurrent State and Federal jurisdiction, and that Congress did not, by the mere passage of the Natural Gas Act, pre-empt the field to the complete exclusion of otherwise valid State action is made abundantly clear by the decisions of this Court in *Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U.S. 682 (1947), and *Panhandle E. Pipe line Co.* v. *Public Service Comm.*, 332 U.S. 507 (1947).

ramifications of the issue at this time. Their purpose at this time is entirely to urge that the Court grant the petition of the Corporation Commission of Kansas for this writ in order that the matter shall not go by default, and whereupon the merits of the question will be fully briefed to the Court.

Thus, at this time, it would seem sufficient to point out that when the Supreme Court of a State is unable to interpret an opinion and mandate of this Court involving a major question of State-Federal relationship any more definitely than to say that the Court's opinion "must be understood to hold" that a constitutionally valid State action must be stricken as of a date when there is a complete absence of Federal action on the same subject matter, then it becomes highly essential for this Court to advise the State Supreme Court if and why its understanding is correct. The term "must be understood to hold", in referring to the opinion and mandate of this Court, itself indicates uncertainty and some degree of speculation on the part of the Kansas Supreme Court as to the real and actual holding of this Court in the case. Moreover, as shown in the Kansas Corporation Commission's petition for certiorari herein, some forty-five cases presently pending in the State and Federal Courts of this country directly involve the issue here under consideration and, without clarification, no uniform or consistent answers may very reasonably be expected to be forthcoming; in short, the meaning of this Court's solution of this very case, upon which may depend the solution of many others, is in dispute and must remain so until settled by this Court. It is for that reason that the undersigned Attorneys General respectfully characterize the issue as "unfinished business" on the part of this Court in the case.

REASON FOR GRANTING THE WRIT

Because the Supreme Court of Kansas erroneously construed the *per curiam* opinion and mandate of this Court in *Cities Service Gas Company v. State Corporation Commission of Kansas, et al.*, 355 U.S. 391, 2 L.Ed. 2d 355, to *require* it to vacate the Kansas 11c minimum price order as invalid *ab initio* on January 1, 1954, when only the question of the validity of the order, and not its date of invalidity, was before this Court in that case.

It would obviously have been inappropriate, when this case was heretofore before this Court, for the Corporation Commission of the State of Kansas to have raised the question of the date of invalidity of its action when the Commission was urging the validity and continued validity of that action; to have done so necessarily would have conceded at the outset the unsoundness of the major premise being relied upon by the Commission in the controversy. Perhaps the Commission could have raised the question on application for rehearing to this Court; however, it was equally permissible for the Commission to have raised the issue in the Kansas Supreme Court, as was diligently done, on the return of this Court's mandate in order "that such execution and proceedings may be had in said cause, in conformity with the judgment and decree of this court above stated, as, according to right and justice, and the Constitution and laws of the United States, ought to be had therein, the said appeal not withstanding."

CONCLUSION

Refusal of the Court to grant the petition for a writ of certiorari in this case will mean that a major question of State-Federal relationship will have been decided by default.

None of the various facets of the problem as discussed and answered in *Larabee* and the other cases herein cited, *supra*, pp. 7-8, will have been either discussed or answered in this case. More importantly, such a default decision, without adequate and stated reasons, will create a seven months' gap—January 1, 1954, to July 16, 1954—between the exercise of valid State and valid Federal regulatory power; will render a State powerless to exercise regulatory authority over matters of local concern because of the possibility of subsequent judicial determination of "direct and positive" conflict with the "dormant and unexercised" regulatory power of a Federal agency; and will cast doubt upon and cloud the validity and effectiveness of presently existing State laws with respect to such matters because of the same future possibility. In short, a summary refusal to review this question will constitute a default determination that the Natural Gas Act of June 21, 1938, was self-executing, which is clearly not the case, and that the Act, as of that date, pre-empted this regulatory field to the complete exclusion of the authority of a State to act upon matters of local concern even though the Federal agency to which Congressional authority had been delegated did not enter such regulatory field for a period of over sixteen years or until July 16, 1954.

It is, therefore, the view of the undersigned Attorneys General that a summary refusal to grant the petition for this writ under the circumstances of this case will be neither a legal nor a proper solution of the problem of State-Federal relationship, here presented.

The petition for the writ should be granted.

Respectfully submitted,

STATE OF KANSAS
John Anderson, Jr.
Its Attorney General

STATE OF ARKANSAS
Bruce Bennett
Its Attorney General

STATE OF ILLINOIS
Grenville Beardsley
Its Attorney General

STATE OF LOUISIANA
Jack P. F. Gremillion
Its Attorney General

STATE OF NEBRASKA
Clarence S. Beck
Its Attorney General

STATE OF NEW MEXICO
Hilton A. Dickson
Its Attorney General

STATE OF OKLAHOMA
Mac Q. Williamson
Its Attorney General

STATE OF TEXAS
Will Wilson
Its Attorney General

STATE OF ARIZONA
Wade Church
Its Attorney General

STATE OF COLORADO
Duke W. Dunbar
Its Attorney General

STATE OF KENTUCKY
Jo M. Ferguson
Its Attorney General

STATE OF MICHIGAN
Paul L. Adams
Its Attorney General

STATE OF NEVADA
Roger Foley
Its Attorney General

STATE OF NORTH DAKOTA
Leslie R. Burgum
Its Attorney General

STATE OF SOUTH DAKOTA
Parnell J. Donohue
Its Attorney General

STATE OF UTAH
Walter L. Budge
Its Attorney General

STATE OF WYOMING
Thomas O. Miller
Its Attorney General